

The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?

ROBERT H. KING, JR.*

I. INTRODUCTION

A divided Supreme Court recently held in *Maryland v. Craig*,¹ that the Sixth Amendment's unambiguous command that "the accused shall enjoy the right . . . to be confronted with the witnesses against him"² reflects a mere "preference for face-to-face confrontation at trial"³ which can be countermanded when "necessary to further an important public policy and . . . where the reliability of the testimony is otherwise assured."⁴ The "public policy" identified by the *Craig* Court was the State's interest in "the physical and psychological well-being of child abuse victims." Because this "public policy" was deemed sufficiently important, and because the reliability of testimony taken via one-way closed circuit television was purportedly "otherwise assured," the child could testify outside the presence of the defendant.⁵

* A.B., Dartmouth College, Magna Cum Laude, 1975; JD, University of Michigan Law School, Magna Cum Laude 1978. Admitted to practice in Illinois (1978) and California (1988). Partner, Sonnenschein Nath & Rosenthal, San Francisco office. This Article is based upon a presentation made to the faculty of South Texas School of Law, Houston, Texas, January 23, 1991. The author wishes to express his appreciation for suggestions made by members of the faculty during the presentation. The author also wishes to express his appreciation to Maria Cristina Gutierrez, Esq., one of the counsel of record for the respondent in *Maryland v. Craig*, for providing access to the *Craig* record and briefs before the Supreme Court, and to Ofer Sharone, a student at Harvard Law School for his research assistance.

¹ 110 S. Ct. 3157 (1990).

² U.S. CONST. amend. VI.

³ *Craig*, 110 S. Ct. at 3165.

⁴ *Id.* at 3166. Justice O'Connor authored the majority opinion, in which Justices Rehnquist, White, Blackmun and Kennedy joined. Justice Scalia dissented, and was joined by Justices Brennan, Marshall and Stevens.

⁵ *Craig*, 110 S. Ct. at 3170. In another 5-4 decision issued on the same day as *Craig*, the Court upheld the Idaho Supreme Court's determination that the admission of inculpatory hearsay testimony under Idaho's "catch-all" hearsay exception patterned after Federal Rule of Evidence 803(24) violated the defendant's federal right to confrontation because the testimony lacked sufficient "particularized guarantees of trustworthiness." *Idaho v. Wright*, 110 S.Ct. 3139, 3149 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

The *Craig* decision is a radical departure from the Supreme Court's pronouncement only two years earlier in *Coy v. Iowa*⁶ that "the Confrontation Clause *guarantees* the defendant a face-to-face meeting with the witness appearing before the trier of fact."⁷ The transformation of the Confrontation Clause's explicit "guarantee" into a mere "preference" in the name of social policy could lead to the virtual elimination of the right to confrontation. Presumably the State has an equally important interest in protecting the traumatized rape victim, the elderly assault victim, or the victim of gang violence. If the Bill of Rights is transformed into the "Bill of Preferences," all of the defendant's "preferences"—from the "preference" for jury trial to the "preference" for counsel—may be ignored if the State's interest is deemed sufficiently "important."

This Article will review the development of the laws enacted to protect the child witness and examine the Supreme Court's responses to such legislation in *Coy* and *Craig*. This Article will demonstrate that the Court's decision in *Craig* was predicated upon a misunderstanding of the Court's prior Confrontation Clause cases, and that the Court used a new and improper constitutional test to abrogate the defendant's face-to-face confrontation rights and then misapplied the new test it created. Although the defendant's right to face-to-face confrontation may not be absolute if examined in the abstract, when the entire constellation of trial rights affected by the child witness procedures are considered and the appropriate test is applied, it becomes evident that such procedures will rarely pass constitutional muster.

II. THE MOLESTED CHILD WITNESS: THE PROBLEM AND PROPOSED LEGISLATIVE SOLUTIONS

A. Child Molestation: An Increasing Problem

Reports of child molestation and abuse have increased dramatically over the past fifteen years. From 1976 until 1985, annual reports of child

The Court rejected the State's argument that independent evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears "particularized guarantees of trustworthiness." Instead, the Court held that "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Wright*, 110 S. Ct. at 3150. Interestingly, the *Craig* minority, along with Justice O'Connor, who authored the *Craig* majority opinion, became the *Wright* majority. Justice Kennedy, joined by Justices Rehnquist, White and Blackmun, dissented.

⁶ 487 U.S. 1012 (1988).

⁷ *Id.* at 1016 (emphasis added).

mistreatment increased nearly three-fold from 669,000 to over 1.9 million.⁸ "The molestation of children has now reached epidemic proportions. Even by conservative estimates, a young American will be sexually molested once every two minutes."⁹ Unfortunately, false reports of molestation have also occurred, and such accusations are becoming alarmingly frequent in divorce and child custody cases.¹⁰

Child molestation is one of the most difficult crimes to detect and prosecute because often the only witness is the child victim.¹¹ Studies suggest that a child victimized by abuse is traumatized further when required to testify during the prosecution of the alleged molester.¹² In a 1974 study, eighty-four percent of

⁸ THE AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING, 1985, 3, 18 (1987); *see also*, AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED, 7 (1985) (indicating that as many as one in every three female adults was sexually abused as a child); DAVID FINKELHOR, CHILD SEXUAL ABUSE, 1-2 (1984); Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1745 n.1 (1983).

⁹ *Child Sexual Abuse Victims in the Courts: Hearings Before the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary*, 98th Cong. 2d Sess. 77 (1984) (opening statement of Sen. Arlen Specter, R. Pa., Chairman of the Subcommittee on Juvenile Justice).

¹⁰ See the description of the Jordan, Minnesota debacle in Justice Scalia's dissent in *Maryland v. Craig*, 110 S.Ct. 3157, 3175-76 (1990); *see also*, 2 *Acquitted of Child Molestation in Nation's Longest Criminal Trial*, N.Y. TIMES, Jan. 19, 1990 at A18 (documenting the 33-month, \$15 million jury trial of the McMartins in Los Angeles which resulted in acquittal of the defendants); Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 228-29 n.13 (1987) (noting that by some estimates, sixty to seventy percent of reported cases are unfounded); Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining 'Confrontation' to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185 n.2-3 (1991). Accusations of child abuse in divorce and child custody cases are now often made in an effort to alter the balance of power between the parties. EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW (Diane H. Schetky et al eds., Brunner/Mazel, Inc. 1985).

¹¹ *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

¹² Gail S. Goodman et al., *The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims: A Preliminary Report*, in THE CHILD WITNESS: DO THE COURTS ABUSE CHILDREN?, AT 46, 48-53 (Graham Davies & Jonquil Drinkwater eds., 1988); Gail S. Goodman, *The Emotional Effects on Child Sexual Assault Victims of Testifying in Criminal Court, Final Report to the National Institute of Justice* (U.S. Dept. of Justice 1989); *see also*, Beth Bjerregaard, *Televised Testimony as an Alternative in Child Sexual Abuse Cases*, 25 CRIM. L. BULL. 164, 169-71 (1989); Ellen Foreman, Note, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 HASTINGS L.J. 437, 439 (1989); Paula E. Hill & Samuel M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85

the judges surveyed believed that children who testified in court in sexual abuse cases were traumatized as a result.¹³ Many child abuse cases are not prosecuted "as a result of problems attending the testimony of children who could not deal with the prospect of facing fathers, step-fathers, relatives and strangers in a courtroom setting."¹⁴ It has been suggested that requiring the child to confront the alleged molester is particularly frightening, and can produce a condition in which the child simply cannot speak of the incident.¹⁵ In recognition of the ordeal that a trial would entail, many parents simply refuse to prosecute.¹⁶ As of 1986, it had been "estimated that only 24% of all cases [of child molestation] nationwide result[ed] in criminal actions."¹⁷

B. Proposed Legislative Solutions

In response to the rise in reported instances of sexual abuse of children and to the problems associated with the molested child witness, several states enacted laws designed to lessen the effect on children of participation in sexual molestation prosecutions. These laws have taken essentially three forms: use of closed circuit television to take the child's testimony, use of videotape depositions to present the child's testimony, and special child hearsay exceptions which permit parents or doctors to testify as to what they were told by the child.

At the time that most of these statutes were enacted, it was the prevailing understanding that the Supreme Court had established a "general approach" in

MICH. L. REV. 809, 819-21 (1987); Jacqueline Y. Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 648-53 (1982); Catherine M. Mahady-Smith, Note, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 732 (1985).

¹³ Rob Lusk & Jill Waterman, *Effects of Sexual Abuse on Children*, in SEXUAL ABUSE OF YOUNG CHILDREN 101, 109 (1986).

¹⁴ State v. Sheppard, 484 A.2d 1330, 1333 (N.J. Sup. 1984) (as many as 90% of the child abuse cases in one prosecutor's office dismissed due to reluctance of child to testify); see also, Smith, *supra* note 12, at 721-22.

¹⁵ Hill & Hill, *supra* note 12, at 827; see also, Maira H. Bainor, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 1017 (1985); LEROY G. SCHULTZ, ED., *THE SEXUAL VICTIMOLOGY OF YOUTH* 195 (1980). But see text accompanying notes 221-35 *infra* (pointing out that the scientific study of the effects of courtroom procedures is in its infancy, and the ability to isolate the impact of the presence of the defendant—as opposed to other factors, such as testifying in public, being subject to cross-examination, etc.,—is highly suspect).

¹⁶ Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 (1985).

¹⁷ Demetra John McBride, *Sexually Abused Children: The Best Kept Legal Secret*, 3 N.Y.L. SCH. J. HUM. RTS. 441, 446 (1986).

*Ohio v. Roberts*¹⁸ for determining when hearsay would be admissible under the Confrontation Clause. First, “the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.”¹⁹ Second, “the Clause countenances only hearsay marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’”²⁰ “Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”²¹ Most of the legislative devices attempted, to a greater or lesser degree, to come within the *Roberts* “general approach.”²²

¹⁸ 448 U.S. 56, 66 (1980). *But see infra* note 159 which demonstrates that this “general approach” is nothing more than dicta and is not fully supported by the Court’s prior Confrontation Clause cases.

¹⁹ *Roberts*, 448 U.S. at 65.

²⁰ *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

²¹ *Roberts*, 448 U.S. at 66.

²² There was, however, some question as to whether the *Roberts* “general approach” was anything more than the “‘Sistine Chapel’ of *obiter dicta*.” *People v. White*, 555 N.E.2d 1241, 1252 (Ill. App. 1990), *cert. granted*, 111 S. Ct. 1681 (1991). In *White*, the defendant was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint. The evidence presented at trial consisted solely of the out-of-court declarations of a four-year-old child who, although present in the courtroom during the trial, did not testify, nor was there any showing that she was unable to testify. *See* Petition for Writ of Certiorari at 3–4. *People v. White*, 555 N.E.2d 1241 (Ill. App. 1990), *cert. granted*, 111 S. Ct. 1681 (1991). Instead, the prosecution introduced the testimony of five witnesses (the child’s babysitter, mother, a police officer, an emergency room nurse and a treating physician) who were permitted to testify as to statements made to them by the child under Illinois’ “spontaneous declaration” (excited utterance) exception and the statements made for the purpose of medical treatment exception to the hearsay rule. *White*, 555 N.E.2d at 1246–51. Like the comparable Federal Rules of Evidence 803(2) and 803(4), these Illinois hearsay exceptions did not require that the declarant be “unavailable.”

The Illinois Appellate Court ruled (before *Craig* and *Wright* were decided) that the *Roberts* “general approach” was merely dicta which had been subsequently restricted to its facts by the Court’s decisions in two cases which indicated that neither unavailability nor a particularized showing of reliability was required for the admission of co-conspirator testimony. *See* *United States v. Inadi*, 475 U.S. 387 (1986); *Bourjaily v. United States*, 483 U.S. 171 (1987). The Illinois Appellate Court held that the question of unavailability “is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule.” *White*, 555 N.E.2d at 1252. The Supreme Court granted certiorari to presumably clarify whether a showing of unavailability is constitutionally mandated. Although the Court in *Idaho v. Wright*, applied the *Roberts* “general approach,” this question was left unresolved: *Wright* did “not raise the question whether, before a child’s out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable—and, if so, what the showing requires” because “[t]he trial court in this case found that respondent’s younger daughter was incapable of communicating with the jury, and the defense counsel agreed.”

1. One-Way or Two-Way Closed Circuit Television

Thirty-two states have authorized the use of either one-way²³ or two-way²⁴ closed circuit television testimony in child abuse cases. The majority of closed circuit statutes permit the broadcasting only of the testimony of child victims, but some allow the broadcasting of testimony of other children as well.²⁵ Age qualifications of the child witness vary, with some statutes limiting their application to children ten years old or less,²⁶ while others allow their application to children as old as eighteen.²⁷ The standards which must be satisfied to invoke the closed circuit procedure range from no standards at all,²⁸

Idaho v. Wright, 110 S.Ct. 3139, 3147 (1990). *See infra* text accompanying notes 155-88 (concerning an alternative understanding of the Court's prior Confrontation Clause cases). *See also infra* notes 173 and 183 (which examine the continuing viability of the *Roberts* dicta).

²³ ALA. CODE § 15-25-3 (1988); ALASKA STAT. § 12.45.046 (1988); ARIZ. REV. STAT. ANN. § 13-4253 (1991); CONN. GEN. STAT. § 54-86g (1989); ILL. REV. STAT. ch. 38, para. 106A-3 (1989); IND. CODE § 35-37-4-8 (1988); IOWA CODE § 910A.14 (Supp. 1990); KAN. STAT. ANN. § 38-1558 (1991); KY. REV. STAT. ANN. § 421-350(1),(3) (Baldwin Supp. 1989); LA. REV. STAT. ANN. § 15:283 (West Supp. 1990); MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1990); MASS. GEN. L. ch. 278, § 16D (1991); MINN. STAT. § 595.02(4) (1992); MISS. CODE ANN. § 13-1-405 (Supp. 1989); N.J. REV. STAT. § 2A:84A-32.4 (1991); OKLA. STAT. tit. 22, § 753(B) (Supp. 1988); OR. REV. STAT. § 40.460(24) (1989); 42 PA. CONS. STAT. §§ 5982, 5985 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); TEX. CODE CRIM. PROC. ANN. art. 38.017, § 3 (West Supp. 1990); UTAH R. CRIM. PROC. 15.5; VT. R. EVID. 807(d).

²⁴ CAL. PENAL CODE § 1347 (West 1991); HAW. R. EVID. 616; IDAHO CODE § 19-3024A (Supp. 1989); MINN. STAT. § 595.02(4)(c)(2) (1988); N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1990); OHIO REV. CODE ANN. §§ 2907.41(C),(E) (Baldwin 1991); VA. CODE ANN. § 18.2-67.9 (1991); VT. R. EVID. 807(e). In a two-way closed circuit television system the child can see the courtroom and the defendant on a video monitor while the jury, judge and the defendant are able to view the child on another monitor during the testimony.

²⁵ *See, e.g.*, ALA. CODE § 15-25-3 (1988); ALASKA STAT. § 12.45.046 (1988); ARIZ. REV. STAT. ANN. § 13-4253 (1991); FLA. STAT. § 92.54 (1989); MASS. GEN. LAWS ANN. ch. 278 § 16D (1989); N.J. STAT. ANN. § 2A:84A-32.4 (1989); PA. CONS. STAT. ANN. tit. 42 § 5985 (1989); UTAH CODE ANN. § 77-35-15.5 (1989).

²⁶ *See, e.g.*, CAL. PENAL CODE § 1347 (West 1989); IND. CODE ANN. § 35-37-4-8 (1989); MINN. STAT. § 595.02 (1988).

²⁷ *See, e.g.*, ALA. CODE 15-25-3 (1988) (under age 16); FLA. STAT. § 92.54 (1989) (under age 16); HAW. R. EVID. 616 (under age 18); MD. FAM. CODE ANN. § 5-701(d) (1989 Supp.) (under age 16); N.J. STAT. ANN. 2A:84A-32.4 (1989) (under age 16).

²⁸ *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4253 (1991); HAW. R. EVID. 616; IOWA CODE § 910A.14 (1989); KY. REV. STAT. ANN. § 421.350 (1991); OKLA. STAT. ANN. tit. 22 § 753 (1989).

to generalized requirements that "good cause [be] shown,"²⁹ or that "justice so requires,"³⁰ or that it be "in the best interests of the child."³¹ Some states even require detailed findings which must be made (usually on the record) focusing upon the emotional trauma that in-court testimony would produce.³²

2. Videotape Testimony

Thirty-seven states have enacted laws to permit the use of videotaped testimony of sexually abused children.³³ Some states admit the videotape of a

²⁹ ALA. CODE § 15-25-2 (1988); PA. CONS. STAT. ANN. tit. 42 § 5985 (1991).

³⁰ LA. REV. STAT. ANN. § 15:283 (1991).

³¹ ILL. REV. STAT. ch. 38 § 106A-3 (1989).

³² See, e.g., CAL. PENAL CODE § 1347(b)(2) (West 1991) (impact of in court testimony so substantial "as to make the minor unavailable as a witness unless closed-circuit television is used"); CONN. GEN. STAT. § 54-86g (1989) (child so "intimidated or otherwise inhibited, by the physical presence of the defendant that a compelling need exists" to use procedure); FLA. STAT. § 92.54(1) (1989) ("there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court"); GA. CODE ANN. § 17-8-55 (1991) (testifying in court will cause "serious emotional distress such that the child cannot reasonably communicate"); IND. CODE ANN. § 35-37-4-8(e)(1)(B)(iii) (1991) ("more likely than not that the child's testifying in the courtroom would be a traumatic experience"); MD. CODE ANN. CTS. & JUC. PROC. § 9-102 (1990) ("serious emotional distress such that the child cannot reasonably communicate"); MASS. GEN. L. ANN. ch. 278:16 D(b)(1) (1991) (child witness must be "likely to suffer psychological or emotional trauma"); MINN. STAT. § 595.02(4)(c) (1992) (testifying in presence of defendant would "psychologically traumatize the witness so as to render the witness unavailable to testify"); N.J. REV. STAT. § 2A:84A-32.4(b) (1991) ("a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court"); OHIO REV. CODE ANN. § 2907.41 (Baldwin 1991) ("serious emotional trauma" from testifying in open court); VA. CODE § 18.2-67.9 (1991) (child unavailable to testify due to "severe emotional trauma from testifying"); VT. R. EVID. 807(c) (showing that "requiring the child to testify in court will present a substantial risk of trauma to the child which would substantially impair the ability of the child to testify").

³³ ALA. CODE § 15-25-2 (1988); ARIZ. REV. STAT. ANN. § 13-4251, 4253(B),(C) (1991); ARK. CODE ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West 1991); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1991); CONN. GEN. STAT. § 54-86(g) (1989); DEL. CODE ANN. tit. 11, § 3511 (1991); FLA. STAT. § 92.53 (1989); HAW. R. EVID. 616; ILL. REV. STAT. ch. 38, para. 106A-2 (1989); IND. CODE §§ 35-37-4-8(c),(d),(f),(g) (1988); KY. REV. STAT. ANN. § 421.350(4) (Baldwin Supp. 1989); MASS. GEN. L. ch. 278, § 16D (1991); MICH. COMP. LAWS § 600.2163a(5) (Supp. 1990); MINN. STAT. § 595.02(4) (1992); MISS. CODE ANN. § 13-1-407 (Supp. 1989); MO. REV. STAT. §§ 491.675-491.690 (1986); NEB. REV. STAT. § 29-1926 (1989); NEV. REV. STAT. § 174.227 (1989); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1989); N.M. STAT. ANN. § 30-9-17 (1984); OHIO REV. CODE ANN. §§ 2907.41(A),(B),(D),(E) (Baldwin 1991); OKLA. STAT. tit. 22, § 753(c) (Supp. 1988); OR. REV. STAT. § 40.460(24) (1989); 42 PA.

child's initial interview by law enforcement officials or social workers as substantive evidence, even though not taken in the defendant's presence or subject to cross-examination, provided the child testifies at the trial.³⁴ Some of the state videotaping statutes provide for taping child testimony at preliminary hearings or at pretrial depositions.³⁵ To be admissible, a majority of the states require that the defendant have a full opportunity to cross-examine the child during the deposition or hearing.³⁶ Several states require that the defendant be present at the time of the videotaping.³⁷ Others, however, contain some provision for keeping the defendant from seeing the child during the testimony.³⁸ The majority of statutes condition admissibility of the videotape testimony upon a finding that the child is "unavailable" to testify because live testimony would cause emotional trauma.³⁹

CONS. STAT. §§ 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); S.C. CODE ANN. § 16-3-1530(G) (1985); S.D. CODIFIED LAWS § 23A-12-9 (1988); TENN. CODE ANN. § 24-7-116(d),(e),(f) (Supp. 1989); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4 (West Supp. 1990); UTAH R. CRIM. PROC. 15.5; VT. R. EVID. 807(d); WIS. STAT. §§ 967.04(7)-967.04(10) (1991); WYO. STAT. § 7-11-408 (1987).

³⁴ See DEBRA WHITCOMB, ET AL., WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 59-68 (1985). The major reasons for videotaping the child's initial interview are: "(1) to reduce the possibility of the child's memory fading over time; (2) to reduce the number of interviews the child must give; (3) to preclude the child from testifying in front of the grand jury; and (4) to prevent the possibility of the child retracting his story because of pressures from family or friends." John A. Stephen, Note, *Preserving the Child Sexual Abuse Victim's Testimony: Videotaping Is Not The Answer*, 1987 DET. C.L. REV. 469, 482.

³⁵ See, e.g., ARIZ. REV. STAT. ANN. §§ 13-4251, 4253(B),(C) (1991); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1991); DEL. CODE ANN. tit. 11, § 3511 (1991); FLA. STAT. § 92.53 (1989); ILL. REV. STAT. ch. 38, P.106A-2 (1989); KAN. STAT. ANN. § 38-1558 (1991); NEV. REV. STAT. § 174.227 (1989); OHIO REV. CODE ANN. § 2907.41(A),(B),(D),(E) (Baldwin 1991); 42 PA. CONS. STAT. §§ 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); TEX. CODE CRIM. PROC. ANN., art. 38.071, § 4 (1991); VT. R. EVID. 807(d); WIS. STAT. ANN. § 967.04(7)-(10) (1991).

³⁶ See, e.g., NEV. REV. STAT. § 174.227 (1989); OHIO REV. CODE ANN. § 2907.41(A) (Baldwin 1991); 42 PA. CONS. STAT. §§ 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4 (1991).

³⁷ See, e.g., ARIZ. REV. STAT. ANN. §§ 13-4251, 4253(B), (C) (1991); FLA. STAT. § 92.53 (1989); ILL. REV. STAT., ch. 38, para. 106A-2 (1989); KAN. STAT. ANN. § 38-1558 (1991); 42 PA. CONS. STAT. §§ 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); VT. R. EVID. 807(d).

³⁸ See, e.g., DEL. CODE ANN., tit. 11, § 3511 (1991); FLA. STAT. § 92.53 (1989); KAN. STAT. ANN. § 38-1558 (1991); 42 PA. CONS. STAT. §§ 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); VT. R. EVID. 807(d).

³⁹ See, e.g., COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1991); FLA. STAT. § 92.53 (1989); OHIO REV. CODE ANN. § 2907.41(A),(B),(D),(E) (Baldwin 1991); R.I. GEN.

3. *Special Child Hearsay Exceptions*

Twenty states have enacted rules or statutes carving out a separate hearsay exception for child victims of, or witnesses to, physical or sexual abuse in various circumstances.⁴⁰ Some of the statutes require, in apparent deference to the *Roberts* "general approach," that the child be unavailable to testify.⁴¹ Others allow any reliable out-of-court statement to be admitted regardless of availability.⁴² Some statutes admit such out-of-court statements only if the child appears at trial and testifies.⁴³ Most statutes require a finding that the out-of-court statement is reliable.⁴⁴

4. *Pre-Coy Judicial Treatment of the Child Witness Statutes*

The constitutionality of some of these procedures was upheld by state courts,⁴⁵ while others were struck down as infringing upon the defendant's

LAWS § 11-37-13.2 (Supp. 1989); VT. R. EVID. 807(d); TEX. CODE CRIM. PROC. ANN., art. 38.071, § 4 (1991); WIS. STAT. ANN. § 967.04 (7)-(10) (1991).

⁴⁰ ALASKA STAT. § 12.40.110 (1991); ARIZ. REV. STAT. ANN. § 13-1416 (1991); ARK. R. EVID. 803(25); CAL. EVID. CODE § 1228 (West 1991); COLO. REV. STAT. § 13-25-129 (1991); FLA. STAT. ANN. § 90.803(23) (1989); ILL. REV. STAT. ch. 37, § 802-18(4)(c) (1991); IND. CODE ANN. §§ 31-6-15-4, 35-37-4-6 (1991); IOWA CODE § 232.96(6) (1989); KAN. STAT. ANN. § 60-460(dd) (1991); MINN. STAT. § 260.156 (1992); MO. REV. STAT. ANN. § 491.075 (1991); NEV. REV. STAT. § 51.385 (1991); 12 OKLA. STAT. § 2803.1 (1992); R.I. GEN. LAWS § 14-1-68 (1990); S.D. CODIFIED LAWS ANN. § 19-16-38 (1991); TEX. CODE CRIM. PROC. art. 38.072 (West 1991); UTAH CODE ANN. § 76-5-411 (West 1991); VT. R. EVID. 803(24); WASH. REV. CODE § 9A.44.120 (1991).

⁴¹ See, e.g., KAN. STAT. ANN. § 60-460(dd) (1991); CAL. EVID. CODE § 1228 (West 1991); ME. REV. STAT. ANN. tit. 15, § 1205 (1987).

⁴² ARIZ. REV. STAT. ANN. §§ 13-4251, 13-4253(B), (C) (1991); ARK. R. EVID. 803(25); COLO. REV. STAT. ANN. §§ 13-25-129 (1991); FLA. STAT. ANN. § 90.803(23) (1989); IND. CODE ANN. § 35-37-4-6 (West 1991); MINN. STAT. § 260.156 (1992); MISS. CODE ANN. § 13-1-407 (1991); MO. REV. STAT. ANN. § 491.075 (1991); NEV. REV. STAT. § 51.385 (1991); OKLA. STAT. ANN. § 2803.1 (1992); S.D. CODIFIED LAWS § 19-16-38 (1991); UTAH CODE ANN. § 76-5-411 (1991); WASH. REV. CODE § 9A.44.120 (1991). These statutes require corroborating evidence for admissibility if the child is unavailable to testify.

⁴³ TEX. CODE CRIM. PROC. ANN., art. 38-072 (West 1991); VT. R. EVID. 803(24). See also Lynn McLain, *Maryland's Statutory Hearsay Exception for Reliable Statements by Alleged Child Abuse Victims: A Hesitant Step Forward*, 17 U. BALT. L. REV. 1, 17 n.66 (1987).

⁴⁴ See WHITCOMB, *supra* note 34.

⁴⁵ See, e.g., *State v. Melendez*, 661 P.2d 654 (Ariz. App. 1982); *McGuire v. State*, 706 S.W.2d 360 (Ark. 1986); *People v. Mathes*, 703 P.2d 608 (Colo. App. 1985); *Chambers v. State*, 504 So.2d 476 (Fla. App. 1987); *Glendening v. State*, 536 So. 2d 212

Sixth Amendment rights.⁴⁶ This divergence of view set the stage for the Court's first direct encounter with the molested child witness statutes in *Coy v. Iowa*.

III. THE COURT'S FIRST ENCOUNTER WITH CHILD WITNESS PROTECTION STATUTES: *COY V. IOWA* STRIKES DOWN THE USE OF A SCREENING DEVICE

A. Background

*Coy v. Iowa*⁴⁷ involved the sexual assault of two thirteen-year-old girls by a man who entered their tent where they had been sleeping. The tent was located in the backyard of the home where one of the girls lived and next door to the house where the defendant resided. Neither girl ever identified the defendant as her assailant.⁴⁸

Seven days before the trial was to begin, the State filed a motion pursuant to Iowa Code Section 910A.3 to have the testimony of the victims taken outside the courtroom and televised by closed circuit television, or alternatively that the defendant be confined behind a screen or mirror that would permit him to see and hear the girls but would not allow the witnesses to see the defendant.⁴⁹ The

(Fla. 1988), *cert. denied*, 492 U.S. 907 (1989); *Altmeyer v. State*, 496 N.E.2d 1328 (Ind. App. 1986); *Miller v. State*, 517 N.E.2d 64 (Ind. 1987); *State v. Johnson*, 729 P.2d 1169 (Kan. 1986); *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986); *State v. Guidroz*, 498 So.2d 108 (La. App. 1986); *State v. Feazell*, 486 So.2d 327 (La. App. 1986); *State v. Bellotti*, 383 N.W.2d 308 (Minn. App. 1986); *In re Welfare of M.S.M.*, 387 N.W.2d 194 (Minn. App. 1984); *State v. Rogers*, 692 P.2d 2 (Mont. 1984); *State v. Heath*, 523 A.2d 82 (N.H. 1986); *State v. Sheppard*, 484 A.2d 1330 (N.J. 1984); *State v. Tafoya*, 765 P.2d 1183 (N.M. App. 1988); *State v. Cooper*, 353 S.E.2d 451 (S.C. 1987).

⁴⁶ *Commonwealth v. Bergstrom*, 524 N.E.2d 366 (Mass. 1988) (decided on state constitutional grounds); *State v. Murphy*, 375 S.E.2d 405 (W.Va. 1988).

⁴⁷ 487 U.S. 1012 (1988).

⁴⁸ Joint Appendix at 7, 14, 20, 32, *Coy v. Iowa*, 487 U.S. 1012 (1988) (No. 86-6757). Both girls gave statements and later testified at a discovery deposition and at trial that they could not identify their assailant, but described him as a muscular man of tall or medium height, wearing a short ponytail. *Id.* at 20, 31, 32-33, 35, 45. One of the girls testified that the man wore a green mask or make-up, and both girls recalled that he wore a watch with a traditional clock face. *Id.* at 31, 32, 38, 39, 40, 41, 44. At trial, the defendant offered unrefuted evidence that he always wore his hair short and never in a ponytail, that he was six foot three and wore a digital watch. *Id.* at 64-67. *See also* Brief for the Appellant at 2-3, *Coy v. Iowa*, 487 U.S. 1012 (1988) (No. 86-6757).

⁴⁹ Brief for the Appellant at 2-3, *Coy* (No. 86-6757). Iowa Code 910A.3 was transferred in the 1987 Iowa Code to section 910A.14, which provides in pertinent part:

State's motion did not set forth any justification for invoking these procedures. The defense objected, arguing that since the girls were unable to identify the defendant as their assailant, testifying in his presence would not be traumatizing for them.⁵⁰ The defense also argued that the proposed screening device implied that the defendant was guilty, infringed on his right to confront witnesses against him, and denied him a fair trial.⁵¹ The trial court overruled defendant's objections, denied the State's request to take the testimony outside the courtroom, but ordered that a one-way screening structure be erected in the courtroom.⁵² The defendant was convicted and appealed.

B. *The Iowa Supreme Court Decision*

The Iowa Supreme Court held that the use of the screening device did not offend the Confrontation Clause. The court rejected the notion that the purpose

1. A court may, upon its own motion or upon motion of any party, order that the testimony of a child as defined in section 702.5 be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony.

The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.

A 1989 amendment deleted the second paragraph. IOWA CODE § 910A.14 (1991).

⁵⁰ Joint Appendix at 6-7, 8, 12-13, *Coy* (No. 86-6757).

⁵¹ *Id.* at 5, 8-13.

⁵² Justice Scalia's opinion characterized the screening device as follows: "After certain lighting adjustments in the courtroom, the screen would enable appellant dimly to perceive the witnesses, but the witnesses to see him not at all." *Coy*, 487 U.S. at 1014. Not surprisingly, the appellant's characterization is far less benign:

Following opening statements, the judge instructed the bailiff to turn off the courtroom lights and close the window blinds. With the courtroom in near total darkness, a screening barrier [over six feet high and four feet wide] was positioned directly in front of appellant at counsel table. The barrier was then illuminated by a panel of four spotlights. Into that "eerie" atmosphere two thirteen-year-old girls were ushered, one at a time, through a special entrance to provide critical testimony as the state's first and primary witnesses against appellant.

Reply Brief for the Appellant at 1, *Coy* (No. 86-6757) (citations omitted).

of the Confrontation Clause was to require that the defendant be allowed the privilege of idly gazing upon all witnesses. Rather, the court held that the Confrontation Clause serves to insure that (1) witnesses will testify in court in full view of the court and jury so that their demeanor may be judged; (2) the testimony will be under oath to enhance its reliability; and (3) the witnesses will be subject to full cross-examination. Since it was clear that the girls' testimony was given in full view of the court and jury, under oath and subject to cross-examination, the Iowa Supreme Court found no Confrontation Clause violation.⁵³

C. The Supreme Court's Decision

By a vote of 6-2, the Supreme Court reversed.⁵⁴ Justice Scalia, writing for the majority, traced the lineage of the Sixth Amendment's confrontation right "to the beginnings of Western legal culture,"⁵⁵ although he acknowledged that its language "comes to us on faded parchment."⁵⁶ Justice Scalia observed that

⁵³ *State v. Coy*, 397 N.W.2d 730, 733-34 (Iowa 1986). The Iowa Supreme Court also rejected defendant's argument that use of the screen had denied him a fair trial by suggesting his guilt, finding the practice was not "inherently prejudicial," and finding no evidence of actual prejudice. *Id.* at 735. Interestingly, however, in arguing in the trial court that the screen should be used even though the girls could not identify the defendant as their assailant, the prosecutor asserted that the girls might be traumatized by testifying in the defendant's presence because *they* assumed he was guilty. Joint Appendix at 14, *Coy* (No. 86-6757).

⁵⁴ Justice Scalia wrote the opinion of the Court, in which Justices Brennan, White, Marshall, Stevens and O'Connor joined. Justice O'Connor also wrote a concurring opinion, in which Justice White joined. Justice Blackmun authored a dissenting opinion, in which Justice Rehnquist joined. Justice Kennedy took no part in the consideration or decision of the case.

⁵⁵ *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988). Justice Scalia recited the Roman Governor Festus' discussion of the treatment of Paul that "[i]t is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face and has been given a chance to defend himself against the charges." *Id.* (quoting *Acts* 25:16). Scalia also noted that the right to confrontation may have been recognized in England before the right to jury trial. *Coy*, 487 U.S. at 1015-16 (citing Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-87 (1959)).

⁵⁶ *Id.* at 1015 (quoting *California v. Green*, 399 U. S. 149, 174 (1970) (Harlan, J., concurring)). Although a number of colonial constitutions contained provisions similar to the Sixth Amendment's Confrontation Clause, scholarly research appears to confirm that "the Confrontation Clause was apparently included without debate along with the rest of the Sixth Amendment package of rights—to notice, counsel, and compulsory process—all incidents of the adversarial proceeding before a jury as evolved during the 17th and 18th centuries." *California v. Green*, 399 U. S. 149, 177 (1970) (Harlan, J., concurring); *see*

the majority of the Court's Confrontation Clause cases have dealt with either "the admissibility of out-of-court statements"⁵⁷ or "restrictions on the scope of cross-examination."⁵⁸ Justice Scalia rejected the notion that these elements "are the essence of the Clause's protection"; instead, "'simply as a matter of English' [the Clause] confers at least 'a right to meet face to face all those who appear and give evidence at trial.'"⁵⁹ "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."⁶⁰

The Court noted that the Confrontation Clause served "ends related both to appearances and realities."⁶¹ References to and quotations "from antiquity" were contained in the majority's opinion "to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"⁶² That perception of fairness had "much truth to it" because:

It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the accuser; both "insur[e] the integrity of the fact-finding process."⁶³

also, FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE U.S.*, 22-24 (1951); Pollitt, *supra* note 55.

⁵⁷ *Coy*, 487 U.S. at 1015 (citing *Ohio v. Roberts*, 448 U.S. 56 (1980); *Dutton v. Evans*, 400 U.S. 74 (1970)).

⁵⁸ *Coy*, 487 U.S. at 1015 (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974)).

⁵⁹ *Coy*, 487 U.S. at 1015 (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)). Justice Scalia went on to note that "simply as a matter of Latin as well" the word "confront" suggests a face-to-face meeting. Shakespeare's *Richard the Second* was cited as further authority for this "root meaning" of confrontation: "'Then call them to our presence—face to face and frowning brow to brow, ourselves will hear the accuser and the accused freely speak. . . .'" *Richard II*, act 1, sc 1." *Coy*, 487 U.S. at 1015.

⁶⁰ *Coy*, 487 U.S. at 1015.

⁶¹ *Id.* at 1017.

⁶² *Id.* (citing *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). Justice Scalia also asserted that "[w]hat was true of old is no less true in modern times," citing President Eisenhower's description of "face-to-face confrontation as part of the code of his home town of Abilene, Kansas." *Coy*, 487 U.S. at 1017.

⁶³ *Coy*, 487 U.S. at 1019-20 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)).

The “profound effect” that face-to-face confrontation has upon a witness was “the very phenomenon [the State] relies upon to establish the potential ‘trauma’” of the child witness justifying the screening device utilized in *Coy*.⁶⁴ While acknowledging that face-to-face confrontation “may, unfortunately, upset the truthful rape victim or abused child,” Justice Scalia maintained that “it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.”⁶⁵

The Court held that the screening device was an “obvious” and “damaging violation of the defendant’s right to a face-to-face encounter.”⁶⁶ Although Justice Scalia admitted that prior cases have suggested that “the rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests,” he explained that the rights involved in those cases “were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit—namely the right to cross-examine . . . the right to exclude out-of-court statements, . . . and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself.”⁶⁷ Such cases did not support “holding that we can identify exceptions in light of other important interests, to the irreducible literal meaning of the clause: ‘a right to meet face to face all those who appear and give evidence at trial.’”⁶⁸ Left “for another day” was whether “any exceptions exist”; any such exception would “surely be allowed only when necessary to further an important public policy” and would necessarily require “something more than the type of generalized finding underlying [the Iowa] statute.”⁶⁹ In light of the Court’s ruling on the Confrontation Clause claim, the Court found it “unnecessary” to evaluate defendant’s due process claim.

1. Justice O’Connor’s Concurrence

Justice O’Connor’s concurring opinion agreed that the defendant’s Confrontation Clause rights had been violated in this case, but cautioned that “those rights are not absolute but rather may give way in the appropriate case to other competing interests.”⁷⁰ Justice O’Connor emphasized that “the Court has time and again stated that the Clause ‘reflects a *preference* for face-to-face confrontation at trial,’ and expressly recognized that this preference may be overcome in a particular case if close examination of ‘competing interests’ so

⁶⁴ *Coy*, 487 U.S. at 1020.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (citations omitted).

⁶⁸ *Id.* at 1021 (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)).

⁶⁹ *Coy*, 487 U.S. at 1021.

⁷⁰ *Id.* at 1022 (O’Connor, J., concurring).

warrants.”⁷¹ Justice O’Connor wished “to make clear that nothing in today’s decision necessarily dooms such efforts by state legislatures to protect child witnesses.”⁷² Justice O’Connor agreed “with the Court that more than the type of generalized legislative finding of necessity present here is required” but noted that “if a court makes a case-specific finding of necessity . . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.”⁷³

2. Justice Blackmun’s Dissent

Justice Blackmun rejected both the defendant’s Confrontation Clause and Due Process challenges to the Iowa procedure. He observed that the “essence” of the confrontation right “is the right to be shown that the accuser is real and the right to probe accuser and accusation in front of the trier of fact.”⁷⁴ The Iowa procedure safeguarded the essence of the right by requiring that the testimony be given under oath, subject to unrestricted cross-examination and in front of the jury so it could evaluate the demeanor of the witness. Additionally, the screening device did not prevent the defendant from seeing and hearing the witnesses and conferring with counsel during their testimony.⁷⁵ The only element of confrontation lacking was the witnesses’ ability to see the defendant. This was, if anything, in Justice Blackmun’s view, a “minimal” infringement on the Confrontation Clause rights.⁷⁶

Justice Blackmun criticized the majority’s reliance on “literature, anecdote and dicta” to support its characterization of the defendant’s claim as involving “the irreducible literal meaning of the clause.”⁷⁷ Justice Blackmun found Dean Wigmore’s conclusion that “[t]here never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination*”⁷⁸ “infinitely more persuasive” than the majority’s reliance upon President Eisenhower or Shakespeare.⁷⁹ That the witness’ ability to see the

⁷¹ *Id.* at 1023 (O’Connor, J., concurring) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63–64 (1980)).

⁷² *Coy*, 487 U.S. at 1023 (O’Connor J., Concurring).

⁷³ *Id.* at 1025.

⁷⁴ *Id.* at 1026 (Blackmun, J., dissenting).

⁷⁵ *Id.* at 1027.

⁷⁶ *Id.* at 1028.

⁷⁷ *Id.* at 1027.

⁷⁸ *Id.* at 1028 (quoting 5 JOHN HENRY WIGMORE, EVIDENCE, § 1397, at 158 (J. Chadbourne ed., rev. 1974)).

⁷⁹ *Id.* at 2807. Justice Scalia disagreed with Justice Blackmun’s reading of Wigmore. Justice Scalia pointed out that Wigmore “did mention (inconsistently with his thesis, it would seem), that a secondary purpose of confrontation is to produce a ‘certain subjective moral effect . . . upon the witness.’” *Id.* at 1018 n.2 (quoting WIGMORE, *supra* note 78,

defendant was not an essential part of the Confrontation Clause's protection was also established by the exceptions to the Clause for certain forms of hearsay statements, which are rarely made in the defendant's presence.⁸⁰ Justice Blackmun concluded that since "had blind witnesses testified against appellant, he could raise no serious objection to their testimony," defendant's claim that the witnesses were precluded from seeing him because of the screen could fare no better.⁸¹

Justice Blackmun argued that the "preference" for face-to-face confrontation at trial could give way "to considerations of public policy and the necessities of the case," and the "limited departure in this case from the type of 'confrontation' that would normally be afforded at a criminal trial therefore is proper if it is justified by a sufficiently significant state interest."⁸² Justice Blackmun stated that the protection of a child witness from the emotional trauma associated with testifying was sufficiently important to outweigh the right for face-to-face confrontation.⁸³ Nor would Justice Blackmun condition such protective procedures upon a case-specific finding of emotional trauma: "[a]s the many rules allowing the admission of out-of-court statements demonstrate, legislative exceptions to the Confrontation Clause of general applicability are commonplace. I would not impose a different rule here by requiring the State to make a predicate showing in each case."⁸⁴

Justice Blackmun also addressed the defendant's Due Process claim. Justice Blackmun did not believe that the screening device was "inherently prejudicial." "Unlike clothing the defendant in prison garb . . . or having the defendant shackled and gagged, . . . using the screening device did not 'brand [appellant] . . . with an unmistakable mark of guilt.'"⁸⁵ This was particularly

§ 1395, at 153). Justice Scalia noted that Wigmore "grudgingly acknowledged" that in "earlier and more emotional periods" this effect "was supposed (more often than it now is) to be able to unstring the nerves of a false witness." *Coy*, 487 U.S. at 1018 n.2.

⁸⁰ *Coy*, 487 U.S. at 1030 (Blackmun, J., dissenting).

⁸¹ *Id.*

⁸² *Id.* at 1031.

⁸³ *Id.* at 1032.

⁸⁴ *Id.* In a footnote, Justice Blackmun referred to the examples of "statements of a co-conspirator, excited utterances, and business records" which were all "generally admissible under the Federal Rules of Evidence without case-specific inquiry into the applicability of the rationale supporting the rule that allows their admission." *Id.* at 1033 n.6. While it is certainly true that some lower courts have held that such hearsay evidence is admissible despite the Confrontation Clause, *see infra* note 157, the Supreme Court has in fact held only two types of hearsay admissible under the Confrontation Clause: former testimony and co-conspirator testimony. *See infra* text accompanying notes 156-88.

⁸⁵ *Id.* at 1034-35 (quoting *Estelle v. Williams*, 425 U.S. 501, 571 (1976) (citations omitted)).

true in light of the judge's instruction to the jury which directed them to draw no inference from the use of the screen.⁸⁶

D. *Post-Coy Confusion: Were There Any Exceptions to Face-to-Face Confrontation?*

As the first Supreme Court opinion to address a child witness protection statute, the *Coy* decision spawned much scholarly debate. Many feared that the logic of *Coy* doomed such statutes⁸⁷ while others saw a glimmer of hope in Justice O'Connor's concurring opinion.⁸⁸ State courts struggled with the question left open by *Coy* as to whether any exceptions to the requirement of a face-to-face confrontation were permissible.⁸⁹ A mere two years after the Court's decision in *Coy*, an opportunity to answer the question was presented by *Maryland v. Craig*.⁹⁰

⁸⁶ *Coy*, 487 U.S. at 1035 (Blackmun, J., dissenting).

⁸⁷ See, e.g., Ellen Foreman, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 HASTINGS L.J. 437 (1989); W. Andrew Hasselbach, Note, *Placing A Child Victim of Sexual Abuse Behind A Screen During Courtroom Testimony As Violation of Sixth Amendment Confrontation Clause: Coy v. Iowa*, 57 U. CIN. L. REV. 1537 (1989); Marshall Young & Sheila McDonald, *The Aftermath of Coy v. Iowa: Are South Dakota's Child Witness Statutes in Jeopardy?*, 34 S.D. L. REV. 627 (1989); John A. Mayers, Note, *Coy v. Iowa: A Constitutional Right of Intimidation*, 16 PEPP. L. REV. 709 (1989); Alisa Odeen, Note, *Defendant's Right to Confront The Witnesses Against Him—Is There An Exception Behind the Screen?: Coy v. Iowa*, 63 ST. JOHN'S L. REV. 124 (1988).

⁸⁸ See, e.g., Beth Bjerregaard, *Televised Testimony as an Alternative in Child Sexual Abuse Cases*, 25 CRIM. LAW BULL. 164 (1989); Jaye Powell Meyer, Note, *Protecting the Child Sexual Abuse Victim From Courtroom Trauma After Coy v. Iowa*, 67 N.C. L. REV. 711 (1989); Rachel I. Wollitzer, Note, *Sixth Amendment—Defendant's Right To Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759 (1988).

⁸⁹ Compare the following cases, upholding various child witness protection statutes, *State v. Vincent*, 768 P.2d 150 (Ariz. 1989) (en banc) (only with individualized showing of trauma will such statutes be upheld); *People v. Thomas*, 770 P.2d 1324, *aff. 'd in part*, 803 P.2d 144 (Colo. 1990); *State v. Bonello*, 554 A.2d 277 (Conn. 1989), *cert. denied*, 490 U.S. 1082 (1989); *State v. Snook*, 555 A.2d 390 (Conn. 1989); *Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, 492 U.S. 907 (1989); *State v. Hoversten*, 437 N.W.2d 240 (Iowa 1989); *In re J.D.S.*, 436 N.W.2d 342 (Iowa 1989); *State v. Conklin*, 444 N.W.2d 268 (Minn. 1989); *State v. Davis*, 550 A.2d 1241 (N. J. Super Ct. App. Div. 1988); *State v. Tafoya*, 765 P.2d 1183 (N.M. 1988), *cert. denied*, 489 U.S. 1097 (1989); *Commonwealth v. Groff*, 548 A.2d 1237 (Pa. Super. 1988); *State v. Taylor*, 562 A.2d 445 (R.I. 1989); *State v. Thomas*, 442 N.W.2d 10 (Wis. 1989), with the following cases finding that such statutes offend the Confrontation Clause, *State v. Murphy*, 542 So.2d 1373 (La. 1989); *Commonwealth v. Bergstrom*, 524 N.E.2d 366 (Mass. 1988) (state confrontation clause grounds); *State v. Murray*, 375 S.E.2d 405 (W.Va. 1988).

⁹⁰ 110 S. Ct. 3157 (1990).

IV. THE COURT'S SECOND ENCOUNTER WITH CHILD WITNESS PROTECTION STATUTES: *MARYLAND V. CRAIG* UPHOLDS THE USE OF ONE-WAY CLOSED CIRCUIT TELEVISED TESTIMONY

A. Background

Sandra Ann Craig was indicted in October 1986 for alleged child abuse, first- and second-degree sexual offenses, perverted sexual practice, assault and battery of one of her students over a one and a half-year period.⁹¹ The student in question was seven years old at the time of trial. In addition to calling the alleged victim, the State intended to call other children who had purportedly also been abused by Craig.⁹²

B. *The Determination That the Children's Testimony Should Be Taken by One-Way Closed Circuit Television*

Before trial, the State invoked a Maryland statutory procedure that permits a child who is the victim of alleged child abuse to testify outside the presence of the judge, jury and defendant through one-way closed circuit television.⁹³

⁹¹ *Id.* at 3160.

⁹² *Id.* at 3161. According to Craig's counsel, the so-called corroborating allegations of the other purportedly abused children were made under questionable circumstances:

The children's allegations were made after a six-month intense and highly publicized investigation launched as a result of a report of suspected sexual child abuse based on the comment of a teacher, who worked at another day care facility, to a health department nurse about a child, who had previously attended the Craig County Pre-School. That child allegedly reported to someone else that she had a dream about Pinocchio. The investigation included sending letters to all parents of all children who had attended the Craig County Pre-School, outlining the allegations of sexual child abuse. A meeting was held where further information about the allegations was disseminated and parents urged to have their children 'evaluated' at the Howard County Sexual Assault Center.

Respondent's Brief at 1 n.1, *Maryland v. Craig*, 110 S. Ct. 3157 (1990) (No. 89-478).

After trial, Craig successfully subpoenaed the therapists', psychologists' and psychiatrists' notes of the "therapy" sessions with the four children who testified at trial, as well as the records of the Howard County Sexual Assault Center. Craig maintained that these materials contained much exculpatory material casting doubt on the credibility of the children, their competency to testify, and their supposed inability to testify live face-to-face in a courtroom in the presence of the defendant. Respondent's Brief at 4-5, *Craig*, (No. 89-478).

⁹³ The Maryland statute provides:

Expert testimony was received concerning the difficulty that each child would experience from testifying in front of the defendant.⁹⁴ The trial court did not question or observe any of the children.

(a)(1) In a case of abuse of a child as defined in section 5-701 of the Family Law Article or Article 27, section 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom by means of a closed circuit television if:

(i) The testimony is taken during the proceeding; and (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

(i) The prosecuting attorney;

(ii) The attorney for the defendant;

(iii) The operators of the closed circuit television equipment; and

(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(c) The provisions of this section do not apply if the defendant is an attorney *pro se*.

(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

MD. CODE ANN. CTS. & JUD. PROC., § 9-102 (1990); *see also infra* text accompanying notes 209–19 (highlighting the limitations on the protection afforded by the statute).

⁹⁴ 110 S. Ct. at 3161. The Maryland Court of Appeals characterized the substance of the expert testimony as follows:

The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what "would cause him the most anxiety would be to testify in front of Mrs. Craig. . . ." The child "wouldn't be able to communicate effectively." As to another, an expert said she "would probably stop talking and she would withdraw and curl up." With respect to two others, the testimony was that one would "become highly agitated, that he may refuse to talk, that he would choose his subject regardless of the questions" while the other would "become extremely timid and unwilling to talk."

Based upon the expert testimony, the court granted the State's motion to employ the one-way closed circuit television, finding that "the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress . . . such that each of these children cannot reasonably communicate."⁹⁵ The trial court rejected Craig's Confrontation Clause objection to the procedure, concluding that "although the statute 'take[s] away the right of the defendant to be face to face with his or her accuser,' the defendant retains the 'essence of the right of confrontation,' including the right to observe, cross-examine, and have the jury view the demeanor of the witness."⁹⁶

C. Difficulties Encountered in Utilizing the Procedure

The implementation of the closed circuit television procedure was far from ideal. The video camera technician was in chambers along with the prosecutor, defense counsel and a court clerk. Craig, an additional defense counsel, an additional prosecutor, the judge and the jury were in the courtroom. The image of the child witness was projected for viewing in the courtroom on two nineteen-inch television monitors. The jury could see only the child witness on the screens; the prosecutor and defense attorneys could be heard, but not seen.⁹⁷

There was concern from the outset about the defendant's ability to speak with her counsel during the testimony.⁹⁸ The only way Craig could communicate with her counsel (who was in chambers with the child) was by means of an open phone line. The phone receiver was laid on the table next to defense counsel in chambers. Craig, seated in the jury's view in the courtroom, sat with the phone receiver to her ear and had to speak loudly enough for defense counsel to hear her through the open receiver laying on the table.⁹⁹

Craig v. State, 560 A.2d 1120, 1128-29 (Md. 1989).

⁹⁵ Maryland v. Craig, 110 S. Ct. at 3162.

⁹⁶ *Id.* The trial court's ruling was made before the Supreme Court's decision in Coy v. Iowa, 487 U.S. 1012 (1988), and the trial court obviously did not anticipate that the Court would reject the Iowa Supreme Court's similar reasoning.

⁹⁷ Joint Appendix at 89, Maryland v. Craig, 110 S. Ct. 3157 (1990) (No. 89-478); Brief for Respondent at 6, *Craig* (No. 89-478).

⁹⁸ Joint Appendix at 73-74. *See also* Respondent's Brief at 5-6.

⁹⁹ The trial court repeatedly acknowledged the technical difficulties with the phone communication between Craig and her counsel, and with the process of coordinating objections. Joint Appendix at 85-87. For example, during the competency voir dire of the alleged victim, Craig was unable to reach her counsel on the phone, despite repeated efforts. *Id.* at 86. The problem with the phone communication continued throughout the direct and cross-examination of the alleged victim; the judge acknowledged on the record

The acoustics and placement of the microphone for the child witness also made it difficult to hear the testimony in the courtroom.¹⁰⁰

The procedure also required that the audio, but not the video projection, be suspended for resolution of objections to testimony. During the time that counsel would reappear in the courtroom to argue objections at sidebar, the two video monitors would continue to show the child's image to the jury.¹⁰¹

D. The Maryland Court of Appeals Decision

The jury convicted Craig on all counts and the Maryland Court of Special Appeals affirmed the conviction.¹⁰² The Court of Appeals of Maryland reversed and remanded for a new trial.¹⁰³

While the court of appeals acknowledged that the Confrontation Clause did not require a face-to-face courtroom encounter in all cases, it concluded that:

[T]he operative "serious emotional distress" which renders the child victim unable to "reasonably communicate" must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase "in the courtroom" as meaning, for sixth amendment and [state constitution] confrontation purposes, "in the courtroom in the presence of the defendant." Unless prevention of "eyeball-to-eyeball" confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right.¹⁰⁴

The court of appeals found the evidence presented in support of using the one-way closed circuit television procedure "insufficient to reach the high threshold required" by *Coy v. Iowa*.¹⁰⁵ The court of appeals concluded that there had been an insufficient "case-specific finding of necessity"¹⁰⁶ to warrant the trial judge's ruling: "he failed to find—and indeed, on the evidence before him could not have found—that this result [the child's emotional trauma] would be the product of testimony in a courtroom in the defendant's presence."¹⁰⁷ The court of appeals held that, in accordance with *Coy*, the out-of-court procedure "ordinarily cannot be invoked unless the child witness initially is

that Craig had been frantically trying to reach her counsel to insist upon a certain line of cross-examination. *Id.* at 141–59.

¹⁰⁰ Respondent's Brief at 6.

¹⁰¹ Joint Appendix at 83; Respondent's Brief at 7.

¹⁰² *Craig v. State*, 544 A.2d 784 (Md. Ct. Spec. App. 1988).

¹⁰³ *Craig v. State*, 560 A.2d 1120 (Md. 1989).

¹⁰⁴ *Id.* at 1127.

¹⁰⁵ *Id.* at 1126 (citing *Coy v. Iowa*, 487 U.S. 1012 (1988)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1129.

questioned (either in or outside the courtroom) in the defendant's presence."¹⁰⁸ The court of appeals further contended that before using the one-way television procedure, the trial judge must determine whether the child can testify using a two-way television procedure so that the child can see the defendant.¹⁰⁹

E. *The Supreme Court's Decision*

The Supreme Court granted certiorari, and in a 5-4 decision, vacated the judgment of the court of appeals and remanded the case for further proceedings not inconsistent with its opinion.¹¹⁰ Although Justice O'Connor, writing for the majority, acknowledged that only two years earlier in *Coy v. Iowa* the Court had recognized that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact," she countered that "[w]e have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."¹¹¹ Justice O'Connor stated that "[b]ecause the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy*."¹¹²

Justice O'Connor began her analysis of the Confrontation Clause by focusing upon its "central concern": "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing" before the jury.¹¹³ Echoing back to Justice Scalia's etymological argument in *Coy*, Justice O'Connor asserted that the word "confront" "also means a clashing of forces or ideas, thus carrying with it the notion of adversariness."¹¹⁴ Relying upon the Supreme Court's first Confrontation Clause decision, *Mattox v. United States* ("Mattox II"),¹¹⁵ Justice O'Connor contended that the right guaranteed by the Confrontation Clause included not only "'personal examination'"¹¹⁶ but also: "(1) insures that the witness will give his statement under oath . . . ; (2) forces the witness to submit to cross-examination . . . ; [and] (3) permits the jury . . . to observe the demeanor of the witness in making his statement."¹¹⁷

¹⁰⁸ *Id.* at 1127; *see also* Wildermurth v. State, 530 A.2d 275, 289 (Md. 1987).

¹⁰⁹ *Craig v. State*, 560 A.2d at 1128.

¹¹⁰ *Maryland v. Craig*, 110 S. Ct. 3157, 3171 (1990).

¹¹¹ *Id.* at 3162-63.

¹¹² *Id.* at 3163.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 156 U.S. 237 (1895) ("Mattox II").

¹¹⁶ *Craig*, 110 S. Ct. at 3163 (quoting *Mattox II*, 156 U.S. at 242).

¹¹⁷ *Craig*, 110 S. Ct. at 3163 (quoting *California v. Green*, 399 U.S. 149, 158 (1970)).

The “combined effect of these elements of confrontation” served the purposes of the Confrontation Clause.¹¹⁸ Although Justice O’Connor recognized that face-to-face confrontation “forms ‘the core of the values furthered by the Confrontation Clause,’” she asserted that the Court had “nevertheless recognized that it is not the *sine qua non* of the confrontation right.”¹¹⁹ Thus Justice O’Connor observed that “we have never insisted on an actual face-to-face encounter at trial in *every* instance.”¹²⁰ For example, again citing *Mattox* for support, she noted that “we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against defendant despite the defendant’s inability to confront the declarant at trial.”¹²¹ In Justice O’Connor’s mind, this rule established that the right to face-to-face confrontation could not be absolute “for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant”¹²² Justice O’Connor therefore concluded that “[i]n sum, our precedents establish that ‘the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, . . . a preference that ‘must occasionally give way to considerations of public policy and the necessities of the case.’”¹²³

That the right to face-to-face confrontation was not absolute did not, however, mean “that it may be easily dispensed with.”¹²⁴ Justice O’Connor articulated a two-prong test to determine when face-to-face confrontation may be abrogated: “only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”¹²⁵

Justice O’Connor first evaluated the Maryland procedure’s compliance with the “reliability” prong of this test. Although invocation of the Maryland statute prevented the child witness from seeing the defendant, “it preserves all of the other elements of the confrontation right”: testimony under oath,

¹¹⁸ *Craig*, 110 S. Ct. at 3163.

¹¹⁹ *Id.* at 3164 (quoting *California v. Green*, 399 U.S. at 157).

¹²⁰ *Craig*, 110 S. Ct. at 3164.

¹²¹ *Id.* at 3164 (citing *Mattox II*, 156 U.S. at 243). *But see infra* text accompanying notes 161–88 (explaining how *Mattox II* and its progeny, rather than sanctioning wholesale exceptions to the right of face-to-face confrontation, have actually demonstrated the importance placed on face-to-face confrontation *at some point in the trial process*).

¹²² *Craig*, 110 S. Ct. at 3165.

¹²³ *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (emphasis supplied by Justice O’Connor); *Mattox II*, 156 U.S. at 243). *But see infra* text accompanying notes 161–88 (demonstrating that the “preference” referred to is not *whether* there is to be face-to-face confrontation, but *when* such confrontation may take place to satisfy the constitutional guarantee).

¹²⁴ *Craig*, 110 S. Ct. at 3166.

¹²⁵ *Id.*

contemporaneous cross-examination, and the ability of the jury to view the demeanor of the witness.¹²⁶ “[T]he presence of these other elements of confrontation . . . adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded in live, in-person testimony.”¹²⁷ Justice O’Connor concluded that even if the child’s testimony was technically deemed to be hearsay because given “out of court,” “these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause.”¹²⁸

The “critical inquiry” therefore became “whether use of the procedure is necessary to further an important state interest.”¹²⁹ Justice O’Connor concluded that “a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right” to face-to-face confrontation.¹³⁰ The fact that a significant majority of states had enacted child witness protection statutes “attests to the widespread belief in the importance of such a public policy.”¹³¹ In light of the State’s traditional interest in protecting the welfare of children, and “buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court . . . we will not second-guess the considered judgment of the Maryland Legislature” regarding the importance of its interest in protecting child witnesses.¹³²

The final determination was whether the finding of necessity has been a “case-specific one: the trial court must hear evidence and determine whether

¹²⁶ *Id.*

¹²⁷ *Id.* Ironically, this formulation was precisely the one utilized by the Iowa Supreme Court and rejected by the Supreme Court just two years earlier in *Coy v. Iowa*, 487 U.S. 1012 (1988).

¹²⁸ *Craig*, 110 S. Ct. at 3167 (citing *Ohio v. Roberts*, 448 U.S. at 66).

¹²⁹ *Craig*, 110 S. Ct. at 3167.

¹³⁰ *Id.* Justice O’Connor observed that the Court had previously recognized that a State’s interest in “the protection of minor victims of sex crimes from further trauma and embarrassment” is a “compelling one.” *Id.* (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)) (citing *New York v. Ferber*, 458 U.S. 747, 756–57 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990)).

¹³¹ *Craig*, 110 S. Ct. at 3167.

¹³² *Id.* at 3168. Justice O’Connor cited the following academic literature: Brief for American Psychological Association as *Amicus Curiae*; GAIL S. GOODMAN ET AL., EMOTIONAL EFFECTS OF CRIMINAL COURT TESTIMONY ON CHILD SEXUAL ASSAULT VICTIMS, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (U.S. Dep’t of Justice, 1989). *But see infra* text accompanying notes 220–33 (demonstrating that the current state of academic study of the effects of courtroom testimony upon child witnesses does not sufficiently differentiate between the impact of the presence of the defendant as opposed to the effects of the presence of the judge and jury, cross examination, etc.).

use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.”¹³³ The trial court must assure itself that the trauma would be suffered because of the presence of the defendant, not by the courtroom generally; “if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present.”¹³⁴ The trial court must also find that the emotional distress suffered was “more than *de minimis*, i.e., more than ‘mere nervousness or excitement or some reluctance to testify.’”¹³⁵ Justice O’Connor declined to “decide the minimum showing of emotional trauma required for use of the special procedure,”¹³⁶ finding that the standard employed by the Maryland statute—“serious emotional distress such that the child cannot communicate”¹³⁷—to “clearly . . . meet constitutional standards.”¹³⁸

Justice O’Connor rejected the gloss on the Maryland statute that the court of appeals held was mandated by “the high threshold required by” *Coy*.¹³⁹ initial questioning of the child (either inside or outside the courtroom) in the defendant’s presence, and determination of whether less restrictive alternatives (e.g. two-way closed circuit television) would ameliorate the child’s trauma. Although “such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites . . .”¹⁴⁰ Justice O’Connor believed that the trial court in this case “could well have found, on the basis of the expert testimony before it,” that the Maryland statutory requirements had been satisfied.¹⁴¹ Because the court of appeals based its finding that the requisite finding of necessity had not been established upon its interpretation of *Coy*’s “high threshold,” Justice O’Connor could not “be certain whether the court of appeals would reach the same conclusion in light of the legal standard we establish today.”¹⁴² Accordingly, the Court vacated

¹³³ *Craig*, 110 S. Ct. at 3169.

¹³⁴ *Id.* See *supra* note 49 (setting forth the Iowa statute at issue in *Coy v. Iowa*, 487 U.S. 1012 (1988), which provided for one-way closed circuit television with the defendant present).

¹³⁵ *Craig*, 110 S. Ct. at 3169 (quoting *Wildermuth v. State*, 530 A.2d 275, 289 (Md. 1990)).

¹³⁶ *Craig*, 110 S. Ct. at 3169.

¹³⁷ MD. CODE ANN. CTS. & JUD. PROC. § 9-102(a)(ii) (1990).

¹³⁸ *Craig*, 110 S. Ct. at 3169.

¹³⁹ *Craig v. State*, 560 A.2d 1120, 1121 (Md. 1989).

¹⁴⁰ *Craig*, 110 S. Ct. at 3171.

¹⁴¹ *Id.*

¹⁴² *Id.*

the judgment of the court of appeals and remanded the case for further proceedings.¹⁴³

F. Justice Scalia's Dissent

Justice Scalia authored a blistering dissent. "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion."¹⁴⁴ He challenged the majority's assertion that face-to-face confrontation was not an "indispensable element of the Sixth Amendment's guarantee."¹⁴⁵ Although "the Confrontation Clause does not guarantee reliable evidence, it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation."¹⁴⁶ Rejecting the majority's assertion that the Court's prior Confrontation Clause opinions reflect a mere "*preference* for face-to-face confrontation," Justice Scalia explained that such precedents "dealt with the *implications* of the Confrontation Clause and not its literal, unavoidable text."¹⁴⁷ Justice Scalia maintained that "the mode of analysis we have used in the admission of hearsay evidence" could not "be applied . . . to permit what is explicitly forbidden by the constitutional text."¹⁴⁸ In addition, the hearsay analysis has generally included a requirement of unavailability. Justice Scalia

¹⁴³ *Id.* On remand from the Supreme Court, the Maryland Court of Appeals again reversed the conviction and remanded the case for a new trial. *Craig v. State*, 588 A.2d 328 (Md. 1991). The second opinion of the court of appeals again finds that there was no "particularized examination of all the circumstances" focusing on "the impact of public testimony in the presence of the defendant upon the emotional health of the child." *Id.* at 333. Additionally, the court of appeals refused to jettison its prior gloss upon the statute that (1) the child initially be questioned (either inside or outside the courtroom) in the defendant's presence; and (2) that less restrictive alternatives, such as two-way television, be considered. Instead, the court of appeals decided that "they should be preserved, not as commands, but as an aid to the trial judge, in appropriate circumstances, in the determination of the condition precedent prescribed by section 9-109(a)(1)(ii)." *Id.* at 338.

¹⁴⁴ *Craig*, 110 S. Ct. at 3171 (Scalia, J., dissenting).

¹⁴⁵ *Id.* at 3166.

¹⁴⁶ *Id.* at 3172.

¹⁴⁷ *Id.* at 3172-73. For example, Justice Scalia suggests that what *Ohio v. Roberts* "had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial—that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial*, did not have to endure face-to-face confrontation." *Id.* Justice Scalia agreed that "[r]ejecting that . . . was merely giving effect to an evident constitutional preference; there are, after all, many exceptions to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference 'reflected' by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed." *Id.*

¹⁴⁸ *Craig*, 110 S. Ct. at 3173-74 (Scalia, J., dissenting).

rejected the notion that inability to testify in the presence of the defendant satisfied such a requirement: "[i]f uncontroverted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, uncross-examined testimony when the witness is unable to undergo hostile questioning, etc."¹⁴⁹

Justice Scalia also challenged the majority's characterization of the State's interest which supposedly outweighed "the explicit text of the Constitution."¹⁵⁰ Justice Scalia did not believe that the Maryland statute was designed to protect child witnesses, because the State always has the prerogative not to call as witnesses children who will be traumatized by the experience. "The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one."¹⁵¹ Justice Scalia observed that the "'special' reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by 'special' reasons for being particularly insistent upon it in the case of children's testimony [because] [s]ome studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality."¹⁵²

But Justice Scalia felt that this scholarly debate was inappropriate because the value of confrontation need not be defended "because the Court has no authority to question it."¹⁵³ Justice Scalia concluded that the Court had engaged in interest-balancing "where the text of the Constitution simply does

¹⁴⁹ *Id.* at 3174.

¹⁵⁰ *Id.* at 3175.

¹⁵¹ *Id.*

¹⁵² *Id.* (citing D. Stephen Lindsay & Marcia K. Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources*, in CHILDREN'S EYEWITNESS MEMORY 92 (S. Ceci, et al. eds., 1987); Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 230-33 (1987); John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 708-11 (1987)). Justice Scalia also made reference to the Jordan, Minnesota prosecutions. *See supra* note 10. Added to the above list could be the McMartin case in California. *See supra* note 10. The therapist's notes in the *Craig* case itself which, when produced after trial, revealed the therapist's belief that "fantasy and reality were mixed up for" the alleged victim. *See supra* note 92; Respondent's Brief at 4, *Maryland v. Craig*, 110 S. Ct. 3157 (1990) (No. 89-478).

¹⁵³ *Craig*, 110 S. Ct. at 3176 (Scalia, J., dissenting). This was a change from Justice Scalia's approach in the *Coy* decision, in which he apparently felt the need to attempt to justify the constitutional interest advanced by face-to-face confrontation by reference to the Bible, Shakespeare and Eisenhower. *See supra* notes 55-63 and accompanying text.

not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.”¹⁵⁴

V. A CRITICAL ANALYSIS OF *MARYLAND V. CRAIG*

The *Craig* majority's analysis is deficient in several respects. It misreads prior precedent concerning the purported mere “preference” for face-to-face confrontation. The Court announces a new test that is unsupported by precedent and has the potential to seriously erode both the right to face-to-face confrontation and other essential trial protections. The Court then misapplies the test it devises and ignores several other constitutional infirmities present in the Maryland statutory scheme. After a full analysis of all of these deficiencies, it becomes clear that one-way closed circuit television statutes that remove the child witness from the presence of the defendant cannot pass constitutional muster.

A. *The Confrontation Clause Does Not Reflect a Mere “Preference” for Face-to-Face Confrontation*

Justice O'Connor's analysis in *Craig* is premised upon the belief that the Court's prior Confrontation Clause decisions have sanctioned the admissibility of a broad array of hearsay exceptions and that these decisions therefore demonstrate that face-to-face confrontation was a mere “preference” which could be overcome by an important state interest.¹⁵⁵ This premise is, however, demonstrably incorrect.

The Court has *not* sanctioned a broad array of hearsay exceptions, although there is certainly much dicta in the Court's decisions suggesting such a conclusion.¹⁵⁶ Many lower courts have relied upon such dicta to hold that

¹⁵⁴ *Id.*

¹⁵⁵ *Craig*, 110 S. Ct. at 3164–66.

¹⁵⁶ See, e.g., *Mattox v. United States*, 156 U.S. 237, 243–44 (1895) (“*Mattox II*”) (“general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case For instance, there could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations . . . yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility.”); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (“But this general rule of law embodied in the Constitution . . . has always had certain well-recognized exceptions.”); *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (“Nor has the privilege of confrontation at any time been without recognized exceptions, as, for instance, dying declarations or documentary evidence.”); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (“This Court has recognized the admissibility against an

numerous hearsay exceptions are permitted under the Confrontation Clause;¹⁵⁷ at least one court, however, has labeled the Court's discussions of generalized hearsay exceptions to the Confrontation Clause as the "'Sistine Chapel' of *obiter dicta*."¹⁵⁸ In fact, the Court (prior to its recent decision in *White v. Illinois*¹⁵⁹) had actually authorized but two forms of hearsay under the Confrontation Clause: former testimony and co-conspirator statements.¹⁶⁰ An

accused of dying declarations and of testimony of a deceased witness who has testified at a former trial. There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses."); *Dutton v. Evans*, 400 U.S. 74, 80 (1970) ("It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced."); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) ("In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.").

¹⁵⁷ See, e.g., *Haggins v. Warden*, 715 F.2d 1050, 1055-56 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984) (excited utterance); *Hutchins v. Warden*, 715 F.2d 512, 516 (11th Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984) (statement of anonymous informant to police); *United States v. Washington*, 688 F.2d 953, 959 (5th Cir. 1982) (business records); *Lenza v. Wyrick*, 665 F.2d 804, 810-11 (8th Cir. 1981) (state of mind exception); *Williams v. Melton*, 733 F.2d 1492, 1496 (11th Cir.), *cert. denied*, 469 U.S. 1073 (1984) (*res gestae*); *United States v. H. & M., Inc.*, 562 F. Supp. 651, 668 (M.D. Pa. 1983) (statement against penal interest); *People v. Webb*, 466 N.E.2d 936, 945 (Ill. App. Ct. 1984) (dying declaration, relying upon *dicta* in *Pointer v. Texas*); *State v. Wyss*, 370 N.W.2d 745, 758 (1985) (statement to doctor); *Graves v. United States*, 490 A.2d 1086, 1106 (D.C. 1984) (adoptive admission); *State v. Palomo*, 783 P.2d 575 (Wash. 1989) (excited utterance); *State v. Jeffers*, 661 P.2d 1105 (Ariz. 1983) (excited utterance).

¹⁵⁸ *People v. White*, 555 N.E.2d 1241, 1252 (Ill. App. Ct. 1990), *cert. granted*, 111 S. Ct. 1681 (1991).

¹⁵⁹ See *supra* note 182.

¹⁶⁰ See *United States v. Inadi*, 475 U.S. 387, 394-95 (1986). Some commentators have suggested that four exceptions have been recognized: (1) prior testimony of deceased witnesses and dying declarations; (2) prior inconsistent statements; (3) former testimony of unavailable witness; and (4) statements of co-conspirators. Brent J. Fields, *Maryland v. Craig: The Constitutionality of Closed Circuit Testimony in Child Sexual Abuse Cases*, 25 GA. L. REV. 167, 175-79 (1990). The prior testimony of a deceased witness and the prior testimony of an unavailable witness have been treated analytically identically by the Court. As will be shown, the Court has never actually sanctioned dying declarations as an exception to the Confrontation Clause. See *supra* note 165. While it is true that *California v. Green* involved a California statutory hearsay exception for prior inconsistent statements, the statement at issue was one made under oath at a preliminary hearing in the presence of the defendant and subject to cross-examination and thus was the functional equivalent of former testimony. 399 U.S. 149, 151-53 (1970). The only other Confrontation Clause exception which the Court may have recognized was for "[d]ocumentary evidence to

analysis of both lines of cases will demonstrate that neither exception suggests that face-to-face confrontation is a mere "preference."

1. *The Former Testimony Cases Show a Concern for When Confrontation Occurs, Not Whether It Should Occur*

The Court's first direct encounter with the Confrontation Clause occurred in 1895 in *Mattox v. United States* (*Mattox II*).¹⁶¹ The case involved a retrial of a defendant. The government introduced into evidence the prior testimony of two witnesses who had appeared and testified at the first trial, but who had died before the second trial had commenced. Because both witnesses were fully examined and cross-examined at the former trial *in the presence of the defendant*, the Court held that the introduction of their prior testimony did not violate the defendant's right to confrontation. The Court explained that "[t]he authority in favor of the admissibility of such testimony, *where the defendant was present* either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming."¹⁶² The defendant could not claim that the introduction of the former testimony violated his right to confront the witnesses against him because the "substance of the constitutional protection is preserved to the

establish collateral facts admissible under the common law" *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *but see Kirby v. United States*, 174 U.S. 47, 54-55 (1899) ("A fact which can be primarily established only by witnesses cannot be proved against an accused, charged with a different offense . . . except by witnesses who confront him at the trial").

¹⁶¹ 156 U.S. 237 (1895). There had been an earlier case which could have presented the opportunity to address the interplay of the Confrontation Clause and hearsay, but it was decided on other grounds. *See Reynolds v. United States*, 98 U.S. 145 (1879). *Reynolds* involved a criminal bigamy conviction in which the government introduced the prior testimony of the defendant's alleged second wife which had been given at a former trial of the same offense, but under a different indictment. The government had attempted to subpoena the alleged second wife, but the defendant and his family had successfully kept her whereabouts secret. Relying upon a long line of both English and American authority, the Court ruled that the introduction of the prior testimony had not offended the Confrontation Clause because "[t]he Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of what he kept away." *Id.* at 158. The Court did not analyze whether absent the defendant's misbehavior, the prior testimony would be admissible, but foreshadowing part of its subsequent analysis in *Mattox II* the Court did observe that "[t]he accused was present at the time the testimony was given, and had full opportunity of cross-examination." *Reynolds*, 98 U.S. at 161.

¹⁶² *Mattox II*, 156 U.S. at 241 (emphasis added).

prisoner in the advantage he has once had of seeing the witness face to face, and subjecting him to the ordeal of cross-examination."¹⁶³

But in its first detailed analysis of the interplay of hearsay and the Confrontation Clause, the Court began painting its "'Sistine Chapel' of *obiter dicta*" by discussing another hearsay exception which was not at issue before the Court: the dying declaration. The Court's dicta suggested that dying declarations "from time immemorial . . . have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility."¹⁶⁴ The Court's imprecision in analysis might be explained by the fact that just three years earlier it had reversed the same defendant's conviction in his first trial (*Mattox I*), in part because the trial court had improperly limited the defendant's attempts to introduce evidence under the dying declaration exception.¹⁶⁵ But *Mattox I* did not raise any Confrontation Clause issue because the evidence was being offered by the defendant, not against the defendant.

Neither *Mattox I* nor *Mattox II* holds that dying declarations are exceptions to the right of face-to-face confrontation, although they are frequently cited for such a proposition.¹⁶⁶ Instead, *Mattox II* stands for the proposition that although the Confrontation Clause envisions that face-to-face confrontation will occur *at trial*, occasionally "considerations of public policy and the necessities of the case"¹⁶⁷ may allow *former confronted* testimony to be admitted when the witness cannot be produced again to testify.

Subsequent cases involving the former testimony exception refined the Confrontation Clause analysis but did *not* suggest that face-to-face confrontation was a mere "preference." Face-to-face confrontation was always required at some point in time.¹⁶⁸ Furthermore, if the circumstances under which the former testimony was taken did not afford the defendant an adequate opportunity to cross-examine the witness, introduction of the transcript would violate the defendant's confrontation rights.¹⁶⁹ Out of deference for the

¹⁶³ *Id.* at 244 (emphasis added).

¹⁶⁴ *Id.* at 243-44.

¹⁶⁵ *Mattox v. United States*, 146 U. S. 140, 152 (1892) ("*Mattox I*").

¹⁶⁶ *See, e.g. Maryland v. Craig*, 110 S. Ct. 3157, 3164-65 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1030-32 (1988) (Blackmun, J., dissenting); *Ohio v. Roberts*, 448 U.S. 56, 64, 67 n.8 (1990); *California v. Green*, 399 U.S. 149, 182 (1970) (Harlan, J., concurring); *Fields*, *supra* note 159, at 175-76; *Schwalb*, *supra* note 10, at 193 n.29.

¹⁶⁷ *Mattox II*, 156 U.S. at 243.

¹⁶⁸ *Kentucky v. Stincer*, 482 U.S. 730 (1987) (defendant's Confrontation Clause rights were not violated by his exclusion from a hearing to determine initially the competency of two children to testify, where he was present during their trial testimony during which the issue of their competency was subject to re-examination if the evidence warranted).

¹⁶⁹ *Pointer v. Texas*, 380 U.S. 400 (1965) (the State introduced a transcript of the testimony of a witness who had testified at a preliminary hearing in the presence of the

Confrontation Clause's "preference" for face-to-face confrontation *at trial*, the Court required the government to demonstrate that a witness was truly unavailable to testify at trial before it would be allowed to use prior confronted testimony as a substitute.¹⁷⁰ If a witness was testifying at trial, his prior inconsistent testimony could be introduced without violating the Confrontation Clause because he could be adequately confronted at trial.¹⁷¹

This analysis of the former testimony cases suggests that Justice O'Connor chose to place emphasis on the wrong word in the following quote from *Ohio v. Roberts*; instead of emphasizing the word "preference," she should have emphasized the words "at trial": "the Confrontation Clause reflects a preference for face-to-face confrontation *at trial*" that "must occasionally give way" to the use of former testimony that has been subjected to face-to-face confrontation and cross-examination *prior to trial*.¹⁷² The former testimony

defendant, who at the time was not represented by counsel and who did not cross-examine the witness. The Court held that because the circumstances under which the testimony had been taken did not afford the defendant an adequate opportunity to cross-examine the defendant, the introduction of the testimony at trial violated the defendant's confrontation rights). *See also Ohio v. Roberts*, 448 U.S. 56 (1980) (preliminary testimony of absent witness admissible where defendant's counsel conducted the equivalent of cross-examination, even though witness had been called by defense). Similarly, introduction of confessions implicating the defendant made by witnesses who did not appear at trial or who refused to testify claiming their right against self-incrimination was not permissible. *See Bruton v. United States*, 391 U.S. 123 (1968) (admission of a co-defendant's confession that implicated the appellant violated the Confrontation Clause when the co-defendant did not take the stand); *Douglas v. Alabama*, 380 U.S. 415 (1965) (the Court reversed a conviction because the prosecution introduced the confession of the defendant's alleged accomplice who refused to testify on self-incrimination grounds).

¹⁷⁰ *Barber v. Page*, 390 U.S. 719, 725 (1968) (The State introduced the preliminary hearing testimony of an individual who, at the time of trial, was serving a sentence in a federal penitentiary in an adjoining state. The Court held that such evidence could not be introduced under an "unavailability" exception to the State's hearsay rules where the State had not made a "good-faith effort" to obtain the presence of the witness at trial). *See also Ohio v. Roberts* 448 U.S. 56, 75 (1980) (preliminary hearing testimony admissible where State had served five trial subpoenas, witness had left the state, and even witness's parents did not know where she could be located); *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972) (prior trial testimony admissible when witness had permanently relocated to Sweden at time of second trial).

¹⁷¹ *Green v. California*, 399 U.S. 149, 165 (1970). In *Green*, the state sought to introduce at trial the preliminary hearing testimony of a witness whose trial testimony was inconsistent with the preliminary hearing testimony under California's prior inconsistent statement hearsay exception. The Court found that, because the witness was present at trial and could be "confronted" concerning both his trial testimony and his preliminary hearing testimony, no Confrontation Clause violation was present.

¹⁷² *Maryland v. Craig*, 110 S. Ct. 3157, 3165 (1990) (quoting *Roberts*, 448 U.S. at 63; *Mattox II*, 156 U.S. at 243).

cases lend no support to the notion that a defendant may be denied the right to face-to-face confrontation with respect to a witness who appears and testifies at trial.¹⁷³

¹⁷³ The former testimony cases also do not strictly support *Roberts*' "general approach" to the admission of hearsay. The former testimony cases do require "unavailability" as a condition for admissibility. *See supra* note 169. But, notwithstanding some dicta in the cases, "reliability" has been assured not by the status of former testimony as a traditionally recognized exception to the hearsay rule, but from the fact that the defendant was previously afforded a right to face-to-face confrontation and cross-examination.

Examination of the former testimony cases cited in *Roberts* confirms this analysis. In *Mattox II*, cited in *Roberts*, 448 U.S. at 67, the hearsay was admissible because the "substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination." 156 U.S. 237, 244 (1895). In *Pointer v. Texas*, cited in *Roberts*, 448 U.S. 66 n.8, the former testimony was not properly admitted because, although the defendant had confronted the witness face-to-face, the defendant had not had an adequate opportunity to cross-examine. *Pointer*, 380 U.S. at 407. In *Mancusi v. Stubbs*, cited in *Roberts* 448 U.S. at 66-67, the former testimony was admitted because the witness was unavailable and because the defendant's lawyer at the first trial was deemed to have had an adequate opportunity to cross-examine despite having been on the case for four days before trial. *Mancusi*, 408 U.S. at 213-16. In *California v. Green*, cited in *Roberts*, 448 U.S. at 67, reliability was assured because of the ability of the defendant to confront and cross-examine the witness at trial concerning his prior testimony. *Green*, 399 U.S. at 165. In *Roberts* itself, the Court's "reliability" analysis focused not on the status of former testimony as a traditionally recognized hearsay exception, but rather upon whether defense counsel had tested the former "testimony with the equivalent of significant cross-examination." *Roberts*, 448 U.S. at 70.

Nor do the two non-former testimony cases cited by the *Roberts* Court support such a "general approach" to hearsay admission. *Snyder v. Massachusetts*, 291 U.S. 97 (1934), cited in *Roberts* 448 U.S. at 64, is arguably neither a hearsay case nor a Confrontation Clause case at all. The *Snyder* Court held that the defendant's Fourteenth Amendment due process rights were not violated by his absence from a jury's trip to view the scene of the crime; in dicta, the Court observed that no Confrontation Clause issue was presented because "the privilege of confrontation . . . is limited to the stages of the trial when there are witnesses to be questioned." *Snyder*, 291 U.S. at 107. The *Roberts* Court also quoted dicta from *Dutton v. Evans*, 400 U.S. 74 (1970). *Dutton* involved the admission of co-conspirator statements; as will be explained, the development of the co-conspirator "exemption" from the hearsay rule is *sui generis* and is not predicated upon the same evidentiary concerns for reliability that have traditionally been the concern of other hearsay exceptions. *See infra* discussion accompanying notes 174-88.

2. The Co-Conspirator "Exception" Does Not Support the Transformation of the Confrontation Right Into a Mere "Preference"

The rationale for the existence of an "exemption" from—rather than an "exception" to¹⁷⁴—the hearsay rule for co-conspirator statements is far from intellectually satisfying. The admissibility of co-conspirator statements developed as a matter of the substantive law of conspiracy.¹⁷⁵ Acts of one co-conspirator were admissible against all of the co-conspirators because each was deemed to have consented to all acts taken to promote the common objective of the conspiracy.¹⁷⁶ This rule was based upon the legal fiction that each co-conspirator was the "agent" of the rest.¹⁷⁷ As early as 1827, co-conspirator statements made in furtherance of the conspiracy were held to be admissible by the Supreme Court as part of the *res gestae* that was essential to the furtherance of the conspiracy.¹⁷⁸ Thus, unlike the exceptions to the hearsay rule, which are predicated upon inherent indicia of reliability,¹⁷⁹ the co-conspirator exemption "is supported by a series of legal fictions, and is based primarily upon policy notions that are completely unrelated to evidence considerations."¹⁸⁰ Perhaps this explains the Court's very different treatment of this area.

Although the Court in *Ohio v. Roberts* purported to announce, in dicta, a general approach to the admission of hearsay under the Confrontation

¹⁷⁴ The Federal Rules of Evidence provide that co-conspirator statements are not to be treated as hearsay at all. FED. R. EVID. 801(d)(2)(E). Although the Court in the non-conspiracy area has indicated that testimony that is not hearsay does not raise Confrontation Clause concerns, *Tennessee v. Street*, 471 U.S. 409, 414 (1985), the Court has explicitly refused to base its analysis of the admission of co-conspirator statements upon the distinction between it being exempted from the hearsay rule, rather than excepted from the hearsay rule. *United States v. Inadi*, 475 U.S. 387, 399 n.12 (1986).

¹⁷⁵ S. Douglas Borisky, Note, *Reconciling the Conflict Between the Co-Conspirator Exemption From the Hearsay Rule and The Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1307 (1985).

¹⁷⁶ See *id.* See also, *United States v. Gooding*, 25 U.S. 460, 462 (1827).

¹⁷⁷ This legal fiction has been severely criticized. As one commentator noted:

Rule 801(d)(2)(E) does not require that the out-of-court statement relate to the declarant's assigned role in the conspiracy or that the defendant be aware of who his cohorts were or what they were saying and doing during the conspiracy. Furthermore, in a large or secretive conspiracy, the extrajudicial declarant may have had no knowledge of the defendant's role in the conspiracy. Therefore, a declarant's statement, based on incomplete information, may mislead the trier of fact.

Borisky, *supra* note 175, at 1308.

¹⁷⁸ *Id.* at 1307; *Gooding*, 25 U.S. at 469-70.

¹⁷⁹ *Idaho v. Wright*, 110 S. Ct. 3139, 3147 (1990).

¹⁸⁰ Borisky, *supra* note 175, at 1300.

Clause,¹⁸¹ and although the Court cited with approval the *Roberts* dicta in both *Craig* and *Wright*,¹⁸² it has refused to apply this general hearsay approach to co-conspirator statements.¹⁸³ Instead, the Court has held that co-conspirator statements are admissible, even if the declarant is available,¹⁸⁴ and without any independent determination that the statements are reliable.¹⁸⁵ This has been justified because the competency of the evidence is "steeped in our jurisprudence"¹⁸⁶ and because co-conspirator statements "are made while the conspiracy is in progress, . . . [and therefore] provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court."¹⁸⁷

In short, the cases dealing with co-conspirator statements appear to be the result of an historical accident involving development of the substantive law of conspiracy. Their analytic shortcomings, however, do not support any notion that the right to face-to-face confrontation is a mere "preference."¹⁸⁸

¹⁸¹ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

¹⁸² *Craig*, 110 S. Ct. at 3165; *Wright*, 110 S. Ct. at 3146.

¹⁸³ In *People v. White*, 555 N.E.2d 1241, 1252 (Ill. Ct. App. 1990), *aff'd*, 112 S. Ct. 736 (1992), the Illinois court read the Court's refusal to apply the generalized *Roberts* dicta to co-conspirator statements as a complete repudiation of *Roberts*. That court held that as a result of *Inadi*:

Whether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule. The only exception to this holding is the factual situation present in *Roberts*, i.e., the use at trial of the previous testimony of a witness who is no longer available.

White, 555 N.E.2d at 1252. Although in light of the Court's subsequent favorable citation to *Roberts* in both *Craig* and *Wright*, *see supra* note 182, it was far from clear that the Court had entirely repudiated *Roberts*, the Court's recent *White* decision now plainly limits *Roberts* to the admissibility of former testimony. *White*, 112 S. Ct. at 741-42. For an in-depth analysis critical of the *White* decision, see Robert H. King, Jr., *Confronting the Confusion: Hearsay and the Confrontation Clause Before and After White v. Illinois* (unpublished Article March 1992).

¹⁸⁴ *United States v. Inadi*, 475 U.S. 387 (1986).

¹⁸⁵ *Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987).

¹⁸⁶ *Id.* at 183.

¹⁸⁷ *Inadi*, 475 U.S. at 395.

¹⁸⁸ It is far from clear to what extent Justice O'Connor derives her understanding that face-to-face confrontation is a mere "preference" from the co-conspirator cases. In *Craig*, Justice O'Connor refers to the "modern" co-conspirator cases (*Inadi* and *Bourjaily*) only in passing, as an example of the "narrow circumstances" in which "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." *Craig*, 110 S. Ct. at 3165 (quoting *Ohio v. Roberts*, 448 U.S. 56, 64 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973))). Since this exemption existed at common law at the time of drafting

B. Craig Utilized the Wrong Test for Determining When Face-to-Face Confrontation Could Be Abrogated

The right to face-to-face confrontation is not a mere "preference": But is it "absolute?" Other Sixth Amendment rights are not absolute: the right to compulsory process does not prohibit the exclusion of a witness whose identity is not disclosed as required by a state's discovery rule,¹⁸⁹ the right to a jury trial does not apply when a defendant is charged with a petty offense,¹⁹⁰ the fair-cross-section requirement does not guarantee a representative jury in any particular case,¹⁹¹ the right to effective assistance of counsel does not guarantee a defendant the right to consult with counsel during a recess in his testimony,¹⁹² and the right to face-to-face confrontation itself may be waived or forfeited.¹⁹³ Justice Black toiled for years in the vineyard of "absolutes" in the First Amendment area without success. Is it reasonable to expect the Sixth Amendment's Confrontation Clause to receive any better treatment?

Since its first encounter with the Confrontation Clause, the Supreme Court has repeatedly (in dicta) suggested that the right of face-to-face confrontation could not be absolute if any hearsay was admissible in criminal trials. The Court has repeatedly declared that a rule eliminating all hearsay would "be too extreme" and "unintended" by the Confrontation Clause.¹⁹⁴ Regardless of the reason, former testimony and co-conspirator statements are admitted without face-to-face confrontation. So, argues Justice O'Connor, the right to face-to-face confrontation cannot be absolute.

of the Constitution, it could be argued, consistent with the reasoning of *Mattox II*, that this anomaly was meant to be grafted onto the Confrontation Clause. Or the "modern" co-conspirator cases could be categorized as part of the Court's "Sistine Chapel of *obiter dicta*," because they could all have been decided on narrower grounds (*i.e.*, lack of reliability), making their Confrontation Clause analysis needless and confusing. *See, e.g.*, *Dutton v. Evans*, 400 U.S. 74 (1970) (admission of statement by one non-testifying co-conspirator harmless where his reliability was questionable and nineteen others appeared at trial and testified); *Inadi*, 475 U.S. at 395 (admission of statement of one non-testifying co-conspirator harmless where his reliability was questionable and three other co-conspirators appeared and testified); *Bourjaily*, 483 U.S. at 185 (sufficient independent evidence of guilt such that the introduction of co-conspirator testimony whose reliability was questionable was harmless).

¹⁸⁹ *Taylor v. Illinois*, 484 U.S. 400 (1988).

¹⁹⁰ *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989).

¹⁹¹ *Holland v. Illinois*, 493 U.S. 474 (1990).

¹⁹² *Perry v. Leeke*, 488 U.S. 272 (1989).

¹⁹³ *Taylor v. United States*, 414 U.S. 17 (1973); *Illinois v. Allen*, 397 U.S. 337 (1970).

¹⁹⁴ *See, e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 63 (1980).

Justice Scalia might argue that admission of such evidence does not *technically* violate the Confrontation Clause since the absent declarant is not a “witness” at trial “against” the defendant.¹⁹⁵ While at first blush this argument might seem hypertechnical and silly, it does hide a fundamental truth: the *Craig* situation, unlike the recognized “exceptions” to the Confrontation Clause, was not a hearsay case. It was a case in which a witness appeared at trial and testified. The fact that the Court has interpreted the Confrontation Clause to allow the introduction of certain types of hearsay evidence does not preclude interpreting the Clause so that a defendant’s right to confront witnesses who actually appear and testify at trial is absolute. Such an approach would be consistent with the dual functions of the Clause: a procedural function to insure the appearance of fairness¹⁹⁶ and an evidentiary function to insure the reliability of evidence received at trial.¹⁹⁷

Admittedly, the Court as presently composed is unlikely to embrace an “absolutist” approach to the Confrontation Clause. Whether or not deemed “absolute,” however, the Court has recognized that the defendant’s right to confrontation is “fundamental.”¹⁹⁸ Ordinarily, when the State seeks to impinge upon a fundamental right, it must demonstrate that such restriction is necessary “in order to promote a compelling interest” *and* the State must choose “the least restrictive means to further the articulated interest.”¹⁹⁹ “It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.”²⁰⁰ Indeed, such a “strict scrutiny” test had been used by the Court in cases raising related issues of the protection of

¹⁹⁵ *Maryland v. Craig*, 110 S. Ct. 3157, 3171–74 (1990) (Scalia, J., dissenting). Justice Scalia argued that the Confrontation Clause does not literally prohibit hearsay evidence at all since it guarantees the defendant only the right to confront “the witnesses against him.” The noun “witness,” argued Justice Scalia, means either “one who knows or sees any thing,” or “one who gives testimony.” *Id.* at 3173 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). While Justice Scalia acknowledged that the first definition would cover hearsay evidence, he contended that such an interpretation is precluded by “the words that follow the noun: ‘witnesses *against him*.’” *Craig*, 110 S. Ct. at 3173–74 (Scalia, J., dissenting). Justice Scalia believed that “[t]he phrase obviously refers to those who give testimony against the defendant at trial.” *Id.*

¹⁹⁶ *See, e.g.*, *Coy v. Iowa*, 487 U.S. 1012, 1018–19 (1988).

¹⁹⁷ *See, e.g.*, *California v. Green*, 399 U.S. 149, 161–62 (1970).

¹⁹⁸ *See, e.g.*, *Pointer v. Texas*, 380 U.S. 400, 405–06 (1965) (the right of confrontation is “an essential and fundamental requirement for . . . [a] fair trial.”); *Green*, 399 U.S. at 176 (Harlan, J., concurring) (“If anything, the confrontation guarantee may be thought, along with the right to compulsory process, merely to constitutionalize the right to a defense as we know it”); *cf.* *Estes v. Texas*, 381 U.S. 532, 540 (1965) (right to a fair trial “the most fundamental of all freedoms”).

¹⁹⁹ *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

²⁰⁰ *Id.*

child trial witness: explicitly in *Globe Newspaper Co. v. Superior Court*,²⁰¹ which reviewed a state statute authorizing closed trials of specified sexual offenses involving children, and *sub silentio* in *Davis v. Alaska*,²⁰² a case involving review of a state statute which had been held to bar impeachment of a juvenile witness with his prior juvenile offenses.

Yet this was not the test employed by Justice O'Connor. Instead she developed a totally new test, which seemed to borrow both from the "middle" level scrutiny test employed in the equal protection cases for "quasi-suspect" classifications,²⁰³ and the so-called "general approach" hearsay test of *Ohio v. Roberts*. She required that the state show only that an abridgement of the right was "necessary to further an *important* public policy," and demonstrate that "the reliability of the testimony is otherwise assured."²⁰⁴ This was a significant and improper departure from precedent and could have devastating effects upon all defendants' Sixth Amendment trial rights.

Implicit in this test is a denigration of the confrontation right. Unlike other fundamental rights, confrontation can be obviated upon a showing of only an "important interest." Many state interests may be "important" ranging from protection of rape victims, elderly victims, and victims of racial violence to the balancing of the budget. But until *Craig*, merely "important" state interests were not enough to justify restricting a fundamental right; a compelling state interest was required. Although the cynic might point to several Court decisions which seemed to elevate even mundane state interests into compelling ones when necessary to justify some government intrusion on a particular right,²⁰⁵ the difference in magnitude of the interest required is not without significance.

Gone is any sort of requirement that the restriction be narrowly tailored to address the interest sought to be advanced. Instead, once an "important

²⁰¹ 457 U.S. 596, 607-08 (1982). Justice O'Connor expressly relied upon *Globe Newspaper* in asserting that the State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a 'compelling' one." *Maryland v. Craig*, 110 S. Ct. 3157, 3167 (1990).

²⁰² 415 U.S. 308, 320 (1974) ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected [the juvenile] from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.").

²⁰³ See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

²⁰⁴ *Craig*, 110 S. Ct. at 3166 (emphasis added).

²⁰⁵ See, e.g., *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

interest" is shown, all the courts are to be concerned with is whether the "reliability of the testimony is otherwise assured."²⁰⁶ But it is virtually impossible to discern whether the testimony is as reliable as it would have been had there been confrontation. As in the situation of the Sixth Amendment's right to "conflict-free" counsel, "the evil . . . is in what the advocate finds himself compelled to *refrain* from doing."²⁰⁷ No one will ever know what the child would have testified if the defendant had been present in the room during the testimony. "Reliability" may also be affected by the manner in which the closed circuit television system is operated, how effectively the defendant can communicate with her counsel, and other factors which can only be determined after the testimony has occurred and the right abridged.

Also missing from the Court's new test is any acknowledgement of the defendant's interest in face-to-face confrontation. In other words, if the state's interest is "important" and the evidence "reliable," then the defendant's confrontation right simply becomes nonexistent. This test does transform the confrontation right into a mere preference, for any time that the state deems it "important" to do so, the right may be ignored. Such a test has the potential for great mischief: Can the right to jury trial or counsel be abrogated if necessary to help minimize the trauma to child witnesses (an important state interest), or to help balance the budget (an important state interest), so long as the evidence received and the outcome of the trial is "reliable"?

There was no reason for Justice O'Connor to deviate from the strict scrutiny test in the *Craig* case, other than an implicit recognition that the Maryland procedure could not possibly survive such scrutiny.²⁰⁸

C. Even if the *Craig* Test Was Appropriate, It Was Misapplied

Assuming that the *Craig* test was appropriate, Justice O'Connor misapplied it. She ignored certain features about the statute itself which suggest that the state's interest was not so important, she misunderstood the present state of research on the effects of testifying in court upon abused children, and she made assumptions concerning the reliability of the testimony which were not supported by the record. Even applying the *Craig* test, the Court should have affirmed the Maryland Court of Appeals' decision.

²⁰⁶ *Craig*, 110 S. Ct. at 3166.

²⁰⁷ *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). See also *Burger v. Kemp*, 483 U.S. 776, 800 (1987) (Blackmun, J. dissenting) ("Because the conflict primarily compels the lawyer *not* to pursue certain arguments or take certain actions, it is all the more difficult to discern its effect."); Respondent's Brief at 23, *Craig*, (No. 89-478).

²⁰⁸ Because of the way the Maryland statute was drafted, it is doubtful that the interest it was advancing would be found "compelling" or narrowly drawn to advance such interests. See *infra* discussion accompanying notes 210-19.

1. The Maryland Statute Itself Undermined Any Claim That Elimination of Face-to-Face Confrontation Was Necessary to Further an Important State Interest

The Court assumed that the Maryland statutory procedure was "necessary" to further an "important" state interest: "protecting child witnesses from the emotional trauma of testifying" in the presence of the defendant.²⁰⁹ However, while this interest might be an important one in the abstract, the Maryland statute was not designed to further that interest.²¹⁰

If the state's goal was to protect children from the emotional trauma of testifying in the presence of the defendant, it drafted the statute in a peculiar fashion.²¹¹ In the first place, it does not afford protection to all abused child witnesses: Section 9-102 applies only to a child under the age of eighteen whose alleged molester is a parent or other person who has permanent or temporary care or custody or responsibility for the supervision of the child.²¹² While it is true that studies suggest that many molestation cases fall within the

²⁰⁹ *Craig*, 110 S. Ct. at 3169.

²¹⁰ A fundamental problem with the Maryland statute is that it does not recognize that there are two reasons that a child might be so emotionally traumatized by testifying in the presence of the defendant that she could not communicate. The first reason is that the defendant has previously harmed her in a particularly offensive manner (and hence is guilty of the crime). But a second possible reason is that the child is afraid of testifying in the defendant's presence because she is lying. Clearly, although the state may have an important interest in protecting the child in the first instance, it has no interest in protecting the child in the latter instance. The statute authorizes use of the one-way closed circuit television procedure in both instances.

²¹¹ Indeed, the statute as drafted did not limit itself to trauma induced by testimony in the presence of the defendant. Rather, the statute on its face applies if "testimony by the child victim *in the courtroom* will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." MD. CODE ANN. CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1990) (emphasis added). The legislative history cited by the *Craig* majority confirms that the statute was not aimed at insulating the child witness from the defendant *per se*, but from the trauma associated with the courtroom atmosphere. See *Craig*, 110 S. Ct. at 3168 ("The proposal was 'aimed at alleviating the trauma to a child victim *in the courtroom atmosphere* by allowing the child's testimony to be obtained outside of the courtroom.'" *Id.* (quoting *Wildermuth v. State*, 530 A.2d 275, 286 (Md. 1987)). The statute as drafted would thus clearly not survive even the *Craig* majority's analysis were it not for a limiting construction imposed by the Maryland Court of Appeals which construed the phrase "in the courtroom" to necessarily imply "in the courtroom in the presence of the defendant." *Craig v. State*, 560 A.2d 1120, 1127 (Md. 1989).

²¹² See MD. ANN. CODE art. 27, § 35A (1987); MD. CODE ANN. FAM. LAW § 5-701 (Supp. 1989); Respondent's Brief at 25, *Craig* (No. 89-478).

ambit of the statute,²¹³ it is equally true that many cases will not. Moreover, the one-way closed circuit television procedure is not mandated even for all children younger than eighteen allegedly molested by a guardian: The "protection" of the statute is available only for those children whose trauma while testifying will render them unable to "reasonably communicate."²¹⁴ Children who will be severely traumatized by testifying—but are still able to communicate—receive no benefit from the statute.²¹⁵

The Maryland legislature may also have recognized that the interest it sought to advance by the statute was not superior to the defendant's right of face-to-face confrontation. The statute specifically provides that "[t]he provisions of this section do not apply if the defendant is an attorney pro se."²¹⁶ In other words, if a defendant chooses to represent himself during trial, the state may not invoke the one-way closed circuit procedure. Is this a tacit admission by the legislature that ultimately the defendant's face-to-face confrontation right is *superior* to the state's interest in protecting child witnesses from trauma? It might be argued that this concession does not constitute recognition of the importance of face-to-face confrontation, but rather only the constitutional necessity of cross-examination. This may be true, but if cross-examination was the only interest which was being accommodated, presumably other methods of preserving cross-examination without allowing face-to-face confrontation could have been specified. For example, the statute could have prescribed the use of a one-way closed circuit television system in which the pro se defendant cross-examined the child from the courtroom via an audio system without face-to-face confrontation. Or the statute could have mandated the appointment of counsel for the limited purpose of cross-examining the child, an alternative that appears to have been adopted by at least one state having a one-way closed circuit television statute.²¹⁷ Maryland chose neither of those alternatives. Instead, if the defendant chooses to appear pro se,

²¹³ See, e.g., Nahman H. Greenberg, *The Epidemiology of Childhood Sexual Abuse*, 51 PEDIATRIC ANNALS 289, 291-92 (1979).

²¹⁴ MD. CODE ANN. CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1990).

²¹⁵ See Schwalb, *supra* note 10, at 196.

²¹⁶ MD. CODE ANN. CTS. & JUD. PROC. § 9-102(c) (1990).

²¹⁷ TEX. CODE CRIM. PROC. ANN. art. 38.071 (West Supp. 1989). Surprisingly, very few of the child witness statutes specifically address the issue of the pro se defendant. The Delaware videotape statute expressly provides that a pro se defendant has the right to confront and question the child witness. DEL. CODE ANN. tit. 11, § 3511 (1987). The Missouri videotape statute provides that if the defendant has no counsel, the court will appoint one. MO. ANN. STAT. 491.680.6 (Vernon Supp. 1989). The Vermont videotape rule acknowledges that certain adjustments in the procedure will be required if the defendant is appearing pro se, but does not specify what those adjustments will be. VT. R. EVID. 807(d). The other previously cited statutes (see *supra* notes 23-33) do not address how to deal with the pro se defendant at all.

she has the absolute right to face-to-face confrontation.²¹⁸ Such a system may increase the number of convictions by encouraging defendants to appear pro se, but it is not designed to protect child witnesses from trauma.

Another section of the statute specifically provides that "[t]his section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time."²¹⁹ This too is a tacit admission by the legislature that in cases in which identification of the perpetrator is required, the state's interest in protecting the child witness is not sufficiently important to outweigh the defendant's right to confrontation.

The limited and arbitrary nature of the statute confirms Justice Scalia's observation that the true purpose of the statute was not to protect child witnesses, but to increase convictions for the prosecutor—a significant state interest but not a constitutionally important one.²²⁰

2. Research on the Effects upon Children of Testifying Is Not Sufficiently Advanced to Isolate the Impact of the Presence of the Defendant from Other Sources of Trauma

In support of her conclusion that the Maryland statutory procedure was justified by the state's important interest, Justice O'Connor relied in part upon "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court"²²¹ which was cited in the *amicus curiae* brief filed by the American Psychological Association (the "APA brief").²²² Even the academic authorities cited in the APA brief recognize, however, that "[a]t this point, the empirical literature on the initial effects of child sexual abuse would have to be considered sketchy."²²³ Research is not at a sufficiently advanced stage to be able to differentiate the impact of the presence of the defendant upon the child from a variety of other trauma-inducing aspects of testimony in the courtroom.

Research which has been completed to date suggests that there are a variety of aspects of testifying which can cause stress for children. The physical attributes of the courtroom can be overwhelming to the child, from the size of

²¹⁸ Forcing a defendant to choose between two constitutionally protected rights is itself unconstitutional. *See infra* discussion accompanying notes 256–58.

²¹⁹ MD. CODE ANN. CTS. & JUD. PROC. § 9-102(d) (1990).

²²⁰ The limited and arbitrary nature of the statute also made it subject to attack as unconstitutionally "underinclusive." *See, e.g.,* O'Brien v. Skinner, 414 U.S. 524 (1974).

²²¹ Maryland v. Craig, 110 S. Ct. 3157, 3168–69 (1990).

²²² *Amicus Curiae* Brief for the American Psychological Association at 8, *Craig* (No. 89-478) [hereinafter APA Brief].

²²³ Angela Brown & David F. Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOL. 66, 69 (1986).

the witness chair to the use of microphones.²²⁴ Repeating their stories many times has also been reported to be difficult and confusing to children.²²⁵ Other potentially frightening aspects of participation in a trial include "cross-examination, the audience, being removed from home, the judge, retaliation or retribution by the defendant, general fear of the unknown, and the jury."²²⁶

Although the APA brief argues that research has shown that testifying in the presence of the defendant is particularly stressful, the published research it cites does not support such a conclusion. One of the studies cited involved pretrial interviews of forty-six children;²²⁷ five expressed fear of confronting the accused.²²⁸ Twenty-two children were observed testifying; only two demonstrated signs of distress.²²⁹ Another study²³⁰ involved interviews of seventy-five children from eleven county social service departments in central North Carolina. It concludes that testifying in juvenile court is not traumatizing for children, but testifying in a protracted criminal trial may have lasting adverse effects upon the child witness.²³¹ The factor primarily responsible for this difference appears to be related to the lengthy delays that are commonplace in the criminal law system.²³² The report cautioned "against extrapolation of these data to criminal court testimony."²³³ Lastly, the Goodman Final Report which Justice O'Connor cites does not support the conclusion that testifying in the presence of the defendant causes trauma; it shows similar frequencies for fear of testifying in court and fear of seeing the defendant in court. "This data does not permit separating out which causes which."²³⁴ In fact, the APA Brief itself recognizes that one of the strongest predictors of child witness distress is having to testify many times, which has nothing whatsoever to do with the presence of the defendant and which the Maryland procedure does nothing to ameliorate.²³⁵

²²⁴ WHITCOMB, *supra* note 34, at 18.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ ROBERT FLIN, ET AL., THE CHILD WITNESS (1988), *cited in* APA Brief at 12, *Craig* (No. 89-478).

²²⁸ *Amicus Curiae* Brief for Institute for Psychological Therapies at 11, *Craig* (No. 89-478) [hereinafter IPT Brief].

²²⁹ *Id.*

²³⁰ Desmond K. Runyan, et al., *Impact of Legal Intervention on Sexually Abused Children*, J. PEDIATRICS 647 (1988).

²³¹ *Id.* at 652; *see also* APA Brief at 9, *Craig* (No. 89-478).

²³² Runyan, *supra* note 230, at 652.

²³³ *Id.*

²³⁴ IPT Brief at 12, *Craig* (No. 89-478).

²³⁵ APA Brief at 12-13, *Craig* (No. 89-478).

3. *The Reliability of the Testimony Was Not "Otherwise Assured"*

Justice O'Connor concluded that the "reliability of the testimony was otherwise assured" because the Maryland procedure provided for the oath, contemporaneous cross-examination, and observation by the judge, jury and defendant of the witnesses' demeanor over the television monitor.²³⁶ Indeed, Justice O'Connor asserted that the reliability of the testimony was actually enhanced because the child would be more likely to be able to testify accurately with the emotional distress of facing the defendant removed.²³⁷ She reached this conclusion by ignoring the evidence in the record that showed that the defendant's right to cross-examine had been severely affected by the one-way closed circuit procedure, and by failing to consider the impact of televised testimony generally.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."²³⁸ Except during his own testimony, the defendant has a "right to *unrestricted access* to his lawyer for advice."²³⁹ While it is true that "the Confrontation Clause only guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,'"²⁴⁰ the Maryland procedure seriously diminishes the opportunity for effective cross-examination.

There was evidence in the record that the defendant's communications with her lawyer were severely hampered during critical portions of her cross-

²³⁶ *Craig*, 110 S. Ct. at 3166.

²³⁷ *Maryland v. Craig*, 110 S. Ct. 3157, 3169-70 (citing, *inter alia*, Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181 (1985)). Interestingly, however, a subsequent Goodman study appears to suggest that "there is reason to believe that high levels of stress are associated with better memory," and concludes:

Our general finding was that stress had a facilitative effect on the children's reports. Specifically, planned comparisons revealed that children at the highest stress levels recalled more information than the other children and were less suggestible. Interestingly, the children had to reach a level of great distress before beneficial effects on memory were evidenced.

Gail S. Goodman, et al., *Children's Concerns and Memory: Issues of Ecological Validity in the Study of Children's Testimony*, in *KNOWING AND REMEMBERING IN YOUNG CHILDREN* 249, 273 (Fivush & Hudson 1990). See also IPT Brief at 18-19, *Craig* (No. 89-478).

²³⁸ *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

²³⁹ *Perry v. Leeke*, 488 U.S. 272, 284 (1989) (emphasis added). See also *Geders v. United States*, 425 U.S. 80, 89 (1976).

²⁴⁰ *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987).

examination.²⁴¹ Even had the phone system worked perfectly, it is unlikely that the defendant could have effectively assisted her counsel during the cross-examination; absent virtually yelling into the phone, there could be no guarantee that defense counsel could hear the defendant while he questioned the witness. Hence, the only other person who potentially had actual knowledge of the events to which the child testified was effectively isolated from her counsel and precluded from providing valuable input into the cross-examination. Only by ignoring the record in the case could one easily conclude that the Maryland procedure safeguarded the defendant's right to cross-examine, thereby insuring that the reliability of the testimony was "otherwise assured." This argument was raised by the defendant,²⁴² but wholly ignored by the *Craig* majority.

Justice O'Connor also failed to consider the impact that televised testimony may have upon the judge's and jury's ability to evaluate the demeanor of the witness "when the camera, with its obvious limitation, becomes the juror's eyes and ears."²⁴³ Justice Cardozo once observed that "[i]t is common knowledge that a camera can be so placed, and lights and shadows so adjusted, as to give a distorted picture of reality."²⁴⁴ The Maryland procedure also insures that the picture that the jury sees will be substantially different than what they would see if the witness testified in the courtroom because the jury is unable to see either the prosecutor or the defense attorney. Children are especially susceptible to the suggestion of others,²⁴⁵ and "[t]he nod of approval or look of consternation from the prosecutor can easily influence the testimony of a child witness."²⁴⁶ Finally, "[t]he child's credibility may also be subconsciously enhanced by the television as often the media gives an aura of

²⁴¹ See *supra* text accompanying notes 98-100, for a description of the difficulties involved for the defendant in *Craig* in attempting to communicate with her counsel during cross-examination of the key witnesses.

²⁴² See Respondent's Brief at 29-33, *Craig* (No. 89-478).

²⁴³ Paul W. Ritsema, Note, *Testimony of Children via Closed-Circuit Television in Indiana: Face (to Television) to Face Confrontation*, 23 VAL. U. L. REV. 455, 463 (1989).

²⁴⁴ *Snyder v. Massachusetts*, 291 U.S. 97, 115 (1934).

²⁴⁵ See, e.g., *People v. Delaney*, 199 P. 896, 900 (Cal. Ct. App. 1921) ("The force of suggestion, always strong, is particularly potent with the impressionable and plastic mind of childhood . . . without intending any such result, the repetition of supposed facts in the presence of a child often creates a mental impression or concept that has no objective reality in any actually existing fact."); Elizabeth F. Loftus & Graham M. Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51 (1984); Lenore C. Terr, *The Child Psychiatrist and the Child Witness: Traveling Companions by Necessity, if Not by Design*, 25 J. AM. ACAD. CHILD PSYCH. 462, 469 (1986).

²⁴⁶ Respondent's Brief at 21, *Craig* (No. 89-478); see also Stephen Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547, 553 (1984) (suggestibility especially likely when "the witness has a high regard for the examiner or wants to please her").

credibility and authority to those it portrays.”²⁴⁷ While some studies have suggested that televised testimony (either by television or videotape) has no markedly negative impact upon effective communication with the jury,²⁴⁸ because child witnesses are in many respects unique and no studies have been conducted involving child witnesses in criminal trials,²⁴⁹ the applicability of such studies to the Maryland procedure is questionable. It is thus doubtful that the Maryland procedure afforded the jury the functionally equivalent opportunity to observe the child witness’ demeanor as would have occurred if the child had testified in the courtroom.

D. The Maryland Statute Had Other Constitutional Infirmities That Were Ignored by the Court

The right to a fair trial is a fundamental liberty guaranteed by the Constitution.²⁵⁰ There are a plethora of constitutional protections aimed at implementing this guarantee in addition to those afforded by the Confrontation Clause. Principal among these are the right to counsel, the right of the defendant to assist his counsel in every phase of the trial, and the presumption of innocence. These rights are all designed to afford the criminal defendant “due process”—the right to a fair trial.

The Maryland procedure as applied in the *Craig* case affected, or potentially affected, the defendant’s due process right to a fair trial. In addition, the statute suffered from another constitutional infirmity: it forced an unconstitutional choice upon the defendant between being represented by counsel or confronting face-to-face the child witnesses. Wholly apart from the Confrontation Clause issue, these additional constitutional concerns, some of which were raised by the defendant but ignored by the Court,²⁵¹ should have caused the affirmance of the Maryland Court of Appeals’ decision.

²⁴⁷ Ritsema, *supra* note 243, at 481.

²⁴⁸ See, e.g., Stephen Miller, *The Effects of Videotaped Trial Materials on Juror Responses*, in PSYCHOLOGY AND THE LAW 205 (Bermant, et al., eds., 1976); Debra Whitcomb, *Child Victims in Court: the Limits of Innovation*, 70 JUDICATURE 90, 91 (1986); John E. Hocking, et al., *Videotape in the Courtroom: Witness Deception*, 14 TRIAL 52, 53 (1978); Sherry M. Purdy, Note, *Videotaped Testimony in Child Sexual Abuse Cases: United States v. Binder*, 23 WILLAMETTE L. REV. 193, 203 (1987).

²⁴⁹ Gail S. Goodman et al., *When a Child Takes the Stand: Jurors’ Perceptions of Children’s Eyewitness Testimony*, 11 LAW & HUM. BEHAV. 27, 27–29 (1987) (child witnesses tend to exhibit many characteristics that lower a witness’ perceived credibility).

²⁵⁰ *Estelle v. Williams*, 425 U.S. 501, 503 (1976). See also *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

²⁵¹ See Respondent’s Brief at 24–35, *Craig* (No. 89-478).

1. *The Defendant's Right to Effective Assistance of Counsel Was Affected by the Maryland Procedure*

As previously discussed, the defendant's ability to communicate with her counsel during critical portions of the direct and cross-examinations of the child witnesses was significantly undercut.²⁵²

This interference with the defendant's ability to assist in her defense created real prejudice: "[s]he had taught these children, knew them well, and had special knowledge of each child's intellectual and moral capabilities and therefore could have greatly assisted her counsel" during their cross-examination.²⁵³ It must be remembered that pretrial discovery is much more limited in criminal proceedings than in civil matters.²⁵⁴ The defense often hears the particulars of the witness' story for the first time at trial. Specific items of impeachment or information that could be used to reveal contradictions in the testimony must therefore frequently come from consultation between defendant and counsel. Defendant's access to her counsel during the child witnesses' testimony is therefore crucial, particularly when the only persons present during the alleged crime are the child witness and the defendant.

Any procedure which isolates the defendant from her counsel creates the opportunity for interference with the right to counsel; the Maryland procedure virtually assures it.

2. *The Maryland Statute Forces an Unconstitutional Choice Between Exercising the Right to Counsel or the Right to Face-to-Face Confrontation*

The Maryland statute does not apply "if the defendant is an attorney pro se."²⁵⁵ If the defendant chooses to defend herself without an attorney, the state can *never* (at least under this statute) deny her the right to face-to-face confrontation with all witnesses at trial. Conversely, if the defendant chooses to avail herself of representation by counsel, she risks losing her right to face-to-face confrontation because the provisions of the Maryland statute may be invoked upon the mandated showing. A system which produces such a Hobbesian choice is not constitutionally countenanced.

The Supreme Court has recognized that a forced choice between two fundamental constitutional guarantees is untenable. For example, in *Simmons v.*

²⁵² See *supra* discussion accompanying notes 98-100.

²⁵³ Respondent's Brief at 6, *Craig* (No. 89-478).

²⁵⁴ Compare FED. R. CRIM. P. 16 with FED. R. CIV. P. 26-37. Also recall that the defendant was denied access to certain exculpatory information to which she was entitled under *Brady v. Maryland*, 373 U.S. 83 (1963) until after trial. See *supra* note 92.

²⁵⁵ MD. CODE ANN. CTS. & JUD. PROC. § 9-102(c) (1990).

*United States*²⁵⁶ the Court held that the defendant could not be penalized for the exercise of his Fourth Amendment right to challenge certain evidence through testimony in support of a motion to suppress by then allowing the admission of that testimony to establish the defendant's guilt in violation of his Fifth Amendment right against self-incrimination.²⁵⁷ The *Craig* decision "neglects the serious question" of whether the choice imposed upon the defendant between her right to be represented by counsel and her right to face-to-face confrontation "is constitutionally defensible."²⁵⁸

3. *The Maryland Procedure Could Adversely Affect the Presumption of Innocence*

The presumption of innocence is, in reality, a constitutional assumption. Although it is nowhere expressly articulated, it has been recognized as a fundamental part of the constitutionally mandated right to a fair trial.²⁵⁹ The core of the presumption is that guilt or innocence is to be determined by the jury solely on the basis of evidence adduced at trial, and not on "official suspicion, indictment, continued custody, or other circumstances" of the trial process.²⁶⁰ Not "every practice tending to single out the accused from everyone else in the courtroom must be struck down," however, because the defendant's presence at trial to answer the criminal charges may suggest guilt to some degree.²⁶¹ When a courtroom practice, procedure, or arrangement gives rise to the probability of diluting the presumption of innocence, close scrutiny is required to determine whether there is an unacceptable risk that impermissible factors may consciously or subconsciously influence the jury's deliberations.²⁶² If the actual impact of a specific procedure cannot be precisely determined, its probable impact must be assessed "based on reason, principle, and common human experience."²⁶³

²⁵⁶ 390 U.S. 377 (1968).

²⁵⁷ *Id.* at 394.

²⁵⁸ *Kentucky v. Stincer*, 482 U.S. 730, 754 (1987) (Marshall, J., dissenting) (arguing that majority decision which permitted exclusion of defendant from pre-trial competency hearing "neglects the serious question whether this choice [between being represented by counsel and appearing pro se so that he could be present for the pre-trial hearing] is constitutionally defensible").

²⁵⁹ *Coffin v. United States*, 156 U.S. 432, 453-60 (1895).

²⁶⁰ *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *see also In re Winship*, 397 U.S. 358 (1970).

²⁶¹ *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986).

²⁶² *Id.* at 568; *Estelle v. Williams*, 425 U.S. 501, 503-05 (1976).

²⁶³ *Estelle*, 425 U.S. at 504.

For example, in *Estelle v. Williams*²⁶⁴ the Supreme Court has recognized that compelling a defendant to wear a prison uniform during a jury trial could erode the presumption of innocence because "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment."²⁶⁵ Courts have similarly acknowledged that appearance by the defendant before the jury in shackles or other restraints may affect the presumption of innocence by identifying the defendant as dangerous or suggesting that his guilt is a foregone conclusion.²⁶⁶ Conversely, while "a roomful of uniformed and armed policeman" might undermine a defendant's ability to get a fair trial, the presence of four state troopers sitting behind the defendant did not because of the "wider range of inferences that a juror might reasonably draw from the officers' presence."²⁶⁷

The use of the Maryland one-way closed circuit television procedure poses a substantial risk that presumption of innocence will be eroded. All of the witnesses, save the alleged victims of this heinous crime, appeared to testify in the courtroom before the judge, the jury and the defendant. When it came time for the child witnesses to testify, although they were clearly physically nearby, they testified extensively about the defendant, but not in her presence. The defendant sat at counsel table, huddled over a phone, virtually yelling suggestions to her counsel located in chambers. What was the jury to think of this arrangement? The defendant had been isolated suddenly from the process, and the jury may well have wondered why. Was it because she posed a danger to the children? If the children were afraid to testify in her presence, did not that confirm the truth of their accusations? Her frantic (and sometimes futile) efforts to communicate with her counsel may well have altered the jury's perception of the televised testimony.

Admittedly, the use of the one-way closed circuit television system is not so obviously prejudicial as was the eerily lit screen in *Coy*. But the procedure does tend to single out the defendant and is suggestive that she is a danger to the children and is therefore guilty. In *Craig*, as far as the record discloses, there was no instruction to the jury to attempt to ameliorate the potential for prejudice. While this concern by itself might not have been enough to strike down the procedure, it contributed, in combination with the other constitutional concerns which the Maryland procedure raises, to the denial of a fair trial.

²⁶⁴ 425 U.S. 501 (1976).

²⁶⁵ *Id.* at 504-05. In *Estelle*, however, the defendant failed to object in a timely fashion to the prison clothes which was "sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id.* at 512-13.

²⁶⁶ *See, e.g.*, *Tyars v. Finner*, 709 F.2d 1274 (9th Cir. 1983); *Harrell v. Israel*, 672 F.2d 632 (7th Cir. 1982); *United States v. Samuel*, 431 F.2d 610 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971). *But see Zygodlo v. Wainwright*, 720 F.2d 1221 (11th Cir. 1983).

²⁶⁷ *Holbrook v. Flynn*, 475 U.S. 560, 569-70 (1986).

VI. CONCLUSION

Craig represents a significant departure from the Supreme Court's prior interpretations of the Confrontation Clause. To appreciate this, one need only recognize that for the first time in over two hundred years of Supreme Court jurisprudence, a criminal defendant, who neither waived²⁶⁸ the right to confrontation nor forfeited it by misbehavior,²⁶⁹ has been denied the right to face a witness who actually appeared and testified at trial. It is important to remember that *Craig* was not a case which required the Court to determine whether a certain type of hearsay testimony could be admitted into evidence without violating the Confrontation Clause; both the majority and dissent assumed that one-way closed circuit testimony was the functional equivalent of "in court" testimony.²⁷⁰ Instead, the majority concluded that the anticipated (but unproven) reaction of the child to the mere presence of the defendant, who, as far as the Constitution was concerned had done nothing more heinous than be *accused* of a crime, justified the invocation of a procedure that resulted in a loss of her right to face-to-face confrontation.

Craig was wrongly decided. The Confrontation Clause does not reflect a mere "preference" for face-to-face confrontation. The Court's conclusion to the contrary is obviously the product of what it perceives to be a logical conundrum created by the fact that the Court has allowed certain forms of hearsay to be admitted despite the Confrontation Clause's admonition. But the very limited exceptions explicitly sanctioned by the Court do not warrant the suspension of face-to-face confrontation of witnesses who actually appear and testify at trial. To the contrary, the former testimony cases turn on the principle that face-to-face confrontation, with an adequate opportunity to cross-examine,

²⁶⁸ *Taylor v. United States*, 414 U.S. 17 (1973).

²⁶⁹ *Illinois v. Allen*, 397 U.S. 337 (1970).

²⁷⁰ See *Maryland v. Craig*, 110 S. Ct. 3157, 3167 (1990); *Id.* at 3174 (Scalia, J., dissenting); see also *Commonwealth v. Willis*, 716 S.W.2d 224, 228 (Ky. 1986); *State v. Daniels*, 484 So. 2d 941, 945 (La. Ct. App. 1986) ("this trial technique serves as the functional equivalent of in-court testimony"); *Kansas City v. McCoy*, 525 S.W.2d 336, 339 (Mo. 1975); *People v. Algarin*, 498 N.Y.S.2d 977, 981 (N.Y. Sup. Ct., Bronx Cty. 1986) ("It is apparent to this court from a demonstration of the equipment used in this case that closed circuit television has the capacity to present clear and accurate sounds and images to the defendant, the witness, the judge, the jury and the public [I]nstantaneous closed-circuit television can surely satisfy the dictates of the confrontation clause"); Kimberly Seals Bressler, Comment, *Balancing the Right to Confrontation and the Need to Protect Child Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?*, 12 U. PUGET SOUND L. REV. 109, 118 (1988) ("Modern television techniques are capable of presenting clear and undistorted images, and in some instances, are an improvement over the view that the jury has of the witness.").

must occur at some point to satisfy the Confrontation Clause. Even if the right to face-to-face confrontation is not absolute, the strict scrutiny test must be applied before this fundamental right is abrogated. As demonstrated above, the Maryland statute plainly could not survive such scrutiny. In addition, other important constitutional rights were affected by the Maryland procedure, the cumulative effect of which was to deny the defendant her due process right to a fair trial.

That is not to say that all efforts to lessen the trauma of child witnesses are constitutionally doomed. Upon an appropriate individualized showing of necessity, it is possible to address many of the aspects which have been identified as causing stress for child witnesses by using, for example, a one-way closed circuit television system to take the child's testimony outside the intimidating atmosphere of the courtroom, but with the defendant present. The Iowa statute at issue in *Coy* provided for such an alternative. Such systems would still suffer from impairment of the jury's ability to fully judge demeanor, but the use of wide angle lenses that would broadcast a picture of all of the participants would lessen such impairment. The use of "two-way" closed circuit systems, while raising less of a pure confrontation issue, still physically isolates the defendant from both the witness and defense counsel, raising concerns for the effective assistance of counsel and the presumption of innocence.

